

WILL NASCAR HAVE TO PUT ON THE BRAKES?: THE CONSTITUTIONALITY OF THE FDA'S BAN ON BRAND-NAME TOBACCO SPONSORSHIP IN MOTOR SPORTS

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INTRODUCTION

They come in their motor homes and pick-up trucks, the working class and the wealthy alike. Some come with coolers full of beer. Some come in tee shirts sporting their hero. Some come with no shirts at all. But they all come for the same reason—to see cars blaze around a race track at nearly two-hundred miles per hour; to see their favorite driver bump fenders and “trade paint” with forty other cars on the track; and to see death-defying accidents. When they walk through the turnstiles, the one thing that they are sure to see are advertisements. Welcome to the world of NASCAR auto racing.

Beer, batteries, brakes. Paint, pain reliever, and Pepsi. If you can spell it, they will sell it. On race cars, billboards, flags, tee shirts and caps, advertisements for brand-name products appear everywhere. Above all of this massive marketing barrage, one product stands taller than the others. That product is tobacco, but its days as NASCAR's preeminent sponsor may be short-lived.

On August 23, 1996, President Clinton proclaimed: “With this historic action that we are taking today, Joe Camel and the Marlboro Man will be out of our children's reach forever.”¹ The historic act to which the President was referring was the announcement that nicotine is an addictive drug and, as a result, the FDA has jurisdiction to regulate tobacco.² As a result, the FDA promulgated regulations which govern the access to and promotion of cigarettes and smokeless tobacco to children and adolescents.³

The regulations faced their first challenge in a North Carolina District in the

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1. *Clinton Unveils Tough Tobacco Rules*, INDIANAPOLIS STAR, Aug. 24, 1996, at A1.

2. See *infra* Part II.B. This Note does not address the jurisdictional issue in any depth. But see Ann Mileur Boeckman, *An Exercise in Administrative Creativity: The FDA's Assertion of Jurisdiction Over Tobacco*, 45 CATH. U.L. REV. 991 (1996) and Michael Whatley, *The FDA v. Joe Camel: An Analysis of the FDA's Attempt to Regulate Tobacco and Tobacco Products Under the Federal Food, Drug, and Cosmetic Act*, 22 J. LEGIS. 121 (1996) (both addressing the jurisdictional issue prior to the *Coyne Beahm* decision).

3. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, and 897) [hereinafter FDA Regulations]. The rule regulates only the sale and distribution of cigarettes and smokeless tobacco to adolescents. It does not apply to the sale and distribution of cigars or pipe tobacco.

fall of 1996.⁴ The tobacco industry filed suit claiming that the FDA lacked authority to regulate tobacco products. On April 25, 1997, United States District Judge William L. Osteen, Sr. ruled that the FDA had the authority to regulate cigarettes and tobacco products but that it had exceeded its authority by promulgating restrictions and regulations on the advertisement and promotion of tobacco products.⁵ Judge Osteen declined to decide whether the FDA's regulations violated the First Amendment "[i]n light of the court's finding that [the] FDA lacks authority . . . to restrict the promotion and advertising of tobacco products."⁶ Both sides have appealed the ruling to the Fourth Circuit; however, as of the date of this Note's publication, no opinion has been issued. It is likely that the Fourth Circuit's decision will be ultimately reviewed by the United States Supreme Court.

On June 20, 1997, with the appeal to the Fourth Circuit still pending, the FDA and the tobacco industry reached a proposed settlement agreement that would resolve this issue.⁷ The proposed settlement encompasses the FDA rule promulgated on August 28, 1996 and substantially extends it in many aspects.⁸ The proposed settlement must still be approved by President Clinton and Congress. If the proposed settlement is approved, the judicial appeal to the Fourth Circuit would be dismissed by the tobacco industry and all advertising restrictions contained in both the FDA rule and the proposed settlement would

4. *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997).

5. *Id.* at 1400.

6. *Id.* at 1400 n.33.

7. *Tobacco Settlement Reached by the State Attorneys General and the Tobacco Industry*, June 20, 1997 (available on Westlaw at 121 DER T-14) [hereinafter *Tobacco Settlement*].

8. See *infra* Part II.B (discussing the provisions of the advertising restrictions in the FDA Rule). The proposed settlement is much broader than the original rule. Under the agreement, the tobacco industry would pay approximately \$368.5 billion over 25 years, including \$60 billion in lieu of punitive damages for past conduct. The rights of individuals to sue for compensatory damages would not be abridged and the tobacco industry would be liable for punitive damages for any future conduct. All lawsuits filed against the industry by state attorney generals would be settled in return for a substantial payment that would reimburse states for the tobacco-related costs they have incurred. Furthermore, all lawsuits against the FDA would be dismissed.

In addition to the proposed regulations promulgated by the FDA, the settlement incorporates terms not part of the original FDA rule. With respect to the advertising restrictions, the additional terms include: 1) the elimination of all billboards and outdoor signs; 2) the elimination of all human images and cartoon characters that are used to advertise tobacco products; 3) additional restrictions on point-of-purchase advertisements, including restrictions on their placement in retail stores; 4) the elimination of advertising on the Internet; 5) the ban of direct and indirect payments for tobacco product placement in movies, television programs, and video games; 6) prohibiting direct and indirect payments to "glamorize" tobacco use in the media; and 7) relevant to the subject matter of this Note, protection from a First Amendment challenge. All advertising restrictions contained in the August 28, 1996 FDA rule and the settlement agreement would be placed in consent decrees that would insulate the FDA from constitutional challenges by the tobacco industry and third parties not part of the settlement agreement. *Tobacco Settlement*, *supra* note 7.

be insulated from First Amendment challenges by any party inside or outside of the tobacco industry.

As of publication, neither the President nor Congress has approved the proposed settlement, and it appears that neither ever will. Therefore, the constitutionality of the FDA rule will be left for the courts to decide. Even though Judge Osteen deferred comment on the First Amendment challenge, it is likely that the FDA's rule will be subjected to judicial scrutiny, either by the Fourth Circuit or the Supreme Court, under a First Amendment challenge if the settlement agreement is not accepted.

In a year's time, the FDA has changed its position from claiming that it had no authority to regulate tobacco products, to promulgating sweeping regulations, to negotiating a proposed settlement with the tobacco industry. Why have these recent developments unraveled at breath-taking speed? The reason is simple—smoking has become a major health concern in the United States.⁹ Although the sale of tobacco products to persons under the age of eighteen is illegal in every state,¹⁰ most tobacco users begin using tobacco before they reach eighteen.¹¹ Approximately fifty million Americans smoke cigarettes, while another six million use smokeless tobacco.¹² Four million adolescents smoke cigarettes or use smokeless tobacco,¹³ while three thousand persons under the age of eighteen start using tobacco each day.¹⁴ Ninety percent of all new smokers are under the age of eighteen.¹⁵ According to FDA reports, youth smoking is on the rise.¹⁶ Each year, experts estimate that children and adolescents smoke between 516 million and 947 million packages of cigarettes, and use another 26

9. Each year, more than 400,000 people in the United States die from tobacco related illnesses. FDA Regulations, *supra* note 3, at 44,398. Tobacco kills more people than AIDS, car accidents, homicides, alcohol, illegal drugs, suicides, and fires combined. *Id.*

10. *Id.* at 44,397.

11. *Id.* at 44,398. Eighty-eight percent of smokers smoked their first cigarette before they were 18 and 71% were daily smokers before reaching 18. Charles J. Harder, *Is it Curtains for Joe Camel? A Critical Analysis of the 1995 FDA Proposed Rule to Restrict Tobacco Advertising, Promotion and Sales to Protect Children and Adolescents*, 16 LOY. L.A. ENT. L.J. 399, 400 (1995) (citing Dep't of Health and Human Servs., Preventing Tobacco Use Among Young People: A Report of the Surgeon General 58 (1994)).

12. FDA Regulations, *supra* note 3, at 44,398.

13. *Id.*

14. Harder, *supra* note 11, at 404 (citing John P. Pierce et al., *Trends in Cigarette Smoking in the United States, Projections to the Year 2000*, 261 JAMA 61, 64 (1989)).

15. Richard Lacayo et al., *Put Out the Butt, Junior*, TIME, Sept. 2, 1996, at 51.

16. Between 1991 and 1994, the number of eighth graders who smoked rose 30%, from 14.3% to 18.6%; among twelfth grade students, 31.2% of the students smoked in 1994, as compared to 28.3% in 1991; smoking increased among college freshmen from 9% to 12.5% during the same time period. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,315 (proposed Aug. 11, 1995) [hereinafter Proposed Regulations].

million containers of smokeless tobacco.¹⁷

Under the FDA's final rule, the regulations prohibit, *inter alia*, the "sponsorship of sporting and other events, teams, and entries in a brand name tobacco product, but permit such a sponsorship in a corporate name."¹⁸ What this means, for example, is that Camel cigarettes can no longer display its logo or colors on a race car, nor can a tennis event be sponsored as the Virginia Slims Legend Tour. However, under the rules, a race car could be sponsored by R.J. Reynolds, minus any product identification, and a tennis tour could be sponsored as the Philip Morris Legends Tour.

The world of motor sports is likely to suffer the most as a result of these regulations. It is estimated that the tobacco industry spent \$194 million on sports related sponsorships in 1996.¹⁹ Over the past twenty-five years, R.J. Reynolds (RJR), a leading manufacturer of tobacco products, has spent more than \$200 million sponsoring the National Association of Stock Car Auto Racing (NASCAR) series.²⁰ In the 1996 racing season alone, RJR awarded \$4 million in prize money to drivers on NASCAR's Winston Cup Series.²¹ Overall, RJR spends over \$40 million dollars annually in motor sports programs.²²

The resolution of the battle between the FDA and the tobacco industry, either by the proposed settlement or the pending appeal in the Fourth Circuit will greatly shape the future of motorsports. The world of auto racing will be looking to fill a huge void left by the loss of millions of dollars in advertising revenue from the tobacco industry. Even worse for the tobacco industry is that they will lose another outlet in which to advertise their product.

This Note examines the constitutionality of the ban on brand-name tobacco sponsorships as it exists under the FDA's final rule as published in the Federal Register. The first part of this Note will provide a historical perspective how the relationship between NASCAR and the tobacco industry has developed over the last twenty-five years. Part Two will discuss the FDA's regulations as published in the Federal Register on August 28, 1996. Part Three will provide a perspective on the development of commercial speech jurisprudence. Parts Four and Five of this Note answer the questions that the FDA did not directly answer—whether the rule violates the First Amendment because the FDA did not differentiate between events attended by adults and those attended by children, and whether there is a solution which would allow brand-name tobacco

17. *Id.*

18. FDA Regulations, *supra* note 3, at 44,396. See also *infra* Part II.B for a complete list of the regulations.

19. Bill Koenig, *Auto Racing May Have to Kick Habit*, INDIANAPOLIS STAR, Aug. 24, 1996, at D1.

20. Richard Alm, *Igniting the Opposition*, DALLAS MORNING NEWS, Aug. 24, 1996, at F1.

21. *Id.* R.J. Reynolds, the manufacturer of Winston cigarettes, is a primary sponsor of the elite class of NASCAR racing, the Winston Cup Series, to which it appropriately lent its name.

22. Shav Glick & Jim Peltz, *Up in Smoke?*, L.A. TIMES, Aug. 23, 1996, at C1. This money is spent on prize money, advertising, bonuses and signs at more than 200 race tracks in the United States.

sponsorship in primarily adult events.

I. THE TOBACCO INDUSTRY'S RELATIONSHIP WITH NASCAR

The tobacco industry's relationship with NASCAR began in 1971,²³ shortly after the passage of the Public Health Cigarette Smoking Act of 1969²⁴ which banned cigarette advertisements on television and radio.²⁵ The tobacco industry circumvented the problem of not being able to advertise on television by sponsoring auto racing events and racing teams.²⁶ NASCAR has become the perfect vehicle for the tobacco companies to promote their products.²⁷

Once a regional sport, NASCAR has emerged as the fastest growing sport in America.²⁸ The Winston Cup Series consists of thirty-two races with an average attendance of 171,830 spectators per race.²⁹ The Winston Cup circuit, traditionally dominant in the South, has expanded its national appeal by holding

23. Alm, *supra* note 20, at F1.

24. 15 U.S.C. § 1335 (1994). The Act, as amended, provides: "After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

25. In *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), six corporations who owned radio stations brought suit seeking to enjoin the enforcement of the ban on radio and television tobacco advertisements. The District Court for the District of Columbia held that the advertising ban did not violate the corporations' First Amendment rights. *Id.* at 584. The court reasoned that the six corporations "ha[d] lost no right to speak - they ha[d] only lost an ability to collect revenue from others for broadcasting their commercial messages." *Id.* The court further held that a rational basis existed for banning cigarette advertisements on television and radio, while allowing them in print ads because "the most persuasive advertising" was on television and radio and that the advertisements were "particularly effective in reaching a very large audience of young people." *Id.* at 585-86.

26. David A. Locke, *Counterspeech as an Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport*, 70 IND. L.J. 217, 218 (1994). Locke stated that with respect to the beneficiaries of tobacco advertising in sports, "the fact that tobacco company names and logos appear on television is incidental to the market competition and bears no relation to the 1971 television ad ban." *Id.* at 223.

27. Alan Friedman, editor of Team Marketing Report, a sports business newsletter, observed that the tobacco industry's nexus between sports is not very significant outside of racing. Alm, *supra* note 20, at F1. Vantage cigarettes sponsors a championship golf tournament and Cambridge cigarettes sponsors bowling. There is a Virginia Slims Legend Tour in women's tennis and a Copenhagen Skoal Pro Rodeo. *Id.* Camel sponsors the professional billiards tour. Glick & Peltz, *supra* note 22, at C1.

28. Scott Moore, *Ladies and Gentlemen, Start Your Televisions*, WASH. POST, May 26, 1996, at Y6.

29. *NASCAR Demographics*, NASCAR PUBLIC RELATIONS MATERIALS. In 1980, 32 Winston Cup races drew 1,555,000 fans for an average attendance of 48,594 spectators per race. Attendance has more than tripled over the last 15 years. In 1995, 5,326,721 fans walked through the turnstiles at 31 Winston Cup events—an increase of 343%. *Id.*

races as far north as New York and New Hampshire and as far west as California and Arizona.³⁰ New race tracks in Texas, Las Vegas, and southern California opened their gates to NASCAR in 1997.³¹ NASCAR's marketing strategy includes incorporating its fans into the growth of the sport. In February of 1996, NASCAR opened Daytona USA, at the Daytona International Speedway in Daytona Beach, Florida. The attraction allows fans to drive in a simulated race or be a part of a mock pit-stop.³² NASCAR has opened a line of NASCAR licensed stores and theme restaurants.³³ As a result of its growth, merchandising revenues from NASCAR licensed products are at an all-time high. Merchandise sales have increased from \$60 million in 1990 to \$700 million in 1995,³⁴ and are projected to have surpassed the \$1 billion mark in 1996.³⁵

The growth of the sport has resulted in increased media exposure. Every NASCAR event is televised.³⁶ In 1995, television viewership exceeded 120 million, an increase of twenty-three percent over 1994.³⁷ Over the past five years, NASCAR ratings have increased³⁸ as broadcast and cable networks have increased the amount of time they devoted to race programming.³⁹ In May of 1996, a die-hard race fan could have watched more than one-hundred hours of live race programming.⁴⁰

NASCAR is appealing to sponsors for several reasons. For the tobacco companies, the most obvious reason is that sponsoring race events and racing teams is a vehicle to promote tobacco products on television despite the

30. Chris Roush, *Red Necks, White Socks, and Blue-Chip Sponsors*, BUS. WK., Aug. 15, 1994, at 74.

31. Alm, *supra* note 20, at F1.

32. *Marketing of NASCAR Continues to Expand*, CHARLESTON DAILY MAIL, July 29, 1996, at B3.

33. *Id.*

34. Rick Maloney, *Once Around NASCAR Store Brings the Track to the Fan*, BUSINESS FIRST OF BUFFALO, July 29, 1996 (page references are not available). In 1994, Dale Earnhardt, a seven-time champion on the Winston Cup Circuit, sold over \$900,000 worth of merchandise on QVC in just over two hours. Roush, *supra* note 30, at 74.

35. Roush, *supra* note 30, at 74. Steven M. Bornstein, ESPN, Inc.'s chief executive, said, "The NASCAR guys are the brightest marketers I've known. They understand who they're trying to appeal to, and they've developed some of the brightest racing stars." *Id.*

36. Moore, *supra* note 28, at Y6.

37. Glick & Peltz, *supra* note 22, at C1.

38. Moore, *supra* note 28, at Y6.

39. *Id.* In 1996, The Nashville Network (TNN) scheduled 800 hours of motor sports; ESPN televised sixteen NASCAR Winston Cup races; ESPN2 planned 700 hours of motor sports programming; TBS's Winston Cup ratings increased 23% in 1995 and broadcasted three Winston Cup races in 1996; CBS scheduled 30 hours for 13 NASCAR events, including the Daytona 500, whose ratings increased to 18.2%, reaching 8.82 million homes; and, ABC scheduled 60 hours of racing, including the Indianapolis 500. *Id.*

40. *Id.*

advertising ban.⁴¹ According to Joyce Julius & Associates, a company that studies media time, Winston cigarettes received television exposure worth an estimated \$944,000 during CBS's broadcast of the 1996 Daytona 500.⁴² Furthermore, sports sponsorship is cost effective. Five million dollars will sponsor a top-of-the-line Winston Cup racing team for the entire season.⁴³ Compared to the cost of a thirty second ad on national prime-time television, this is a bargain.⁴⁴

There are other substantial reasons, which few other sports can boast, why a company marketing its product would want to use NASCAR as a marketing tool. A primary reason is the demographics of the more than five million people who attend races each year. Thirty-eight percent of the NASCAR audience is female, while the average annual household income is \$39,280.⁴⁵ Moreover,

41. See *supra* notes 24-25 and accompanying text.

42. Alm, *supra* note 20, at F1. A study conducted by Joyce Julius & Associates revealed that during the 1993 racing season, "tobacco company sponsors' 'names, product(s), or clearly recognizable slogan(s)' received televised mention no fewer than 3675 times . . ." Locke, *supra* note 26, at 223. The report estimated the total value of tobacco industry's television exposure to be over \$31 million. *Id.* at 223 n.37. The value of the sponsor's television exposure was calculated by adding the time of "in-focus" exposure of the product ("in-focus" exposure includes "car identity, uniforms, helmets/hats, shirts, billboards, signs, retaining walls, pit identification, starter's stand, television screen graphics, car transporters, flags, banners, message boards and scoreboards. *Id.* at 223 n.34) and the number of verbal references made to the product. Each verbal reference was rated at 10 seconds. The dollar value of the total exposure was calculated by using the advertising rate for a thirty second commercial during the race broadcast. *Id.* at 223 n.37. During the 1993 NASCAR season, tobacco companies received 16 hours, 5 minutes, 27 seconds of "in-focus" exposure, 1918 sponsor mentions and \$31,379,755 in advertising value. *Id.* (citing Joyce Julius & Associates, 9 SPONSOR'S REP. NO. 32, 1993 NASCAR/WINSTON CUP YEAR END REPORT, at 2-5 (1993)).

43. Roush, *supra* note at 30, at 74.

44. Randall H. Stoner, *200 MPH Cigarette Ads: A Comparison of International Restrictions on Tobacco Sports Sponsorship*, 15 HASTINGS INT'L & COMP. L. REV. 639, 643-44 (1992).

To advertise for 30 seconds on NBC's Bill Cosby Show costs 250,000 dollars. Now a million bucks spent in NASCAR will get you a middle-of-the-pack Winston Cup team, a team that will generate literally hours of exposure on national television for thirty races throughout the year. And it will do so for the cost of two minutes of national advertising.

Id. (quoting Dutch Mandel, *Autopower in the 90's: Advertising & Marketing the Persuaders*, AUTOMOTIVE NEWS, Nov. 29, 1989, at 120).

45. *Marketing of NASCAR Continues to Expand*, *supra* note 32, at B3. See also *NASCAR Demographics*, NASCAR PUBLIC RELATIONS MATERIALS, (Sources: Simmons Market Research Bureau, Inc. and Performance Research). The following is a complete demographic breakdown of the NASCAR audience as provided by NASCAR:

NASCAR fans are extremely brand-loyal.⁴⁶ Over seventy percent of NASCAR fans said that they would “almost always” or “frequently” buy a product involved in NASCAR.⁴⁷ Compared to baseball at fifty-eight percent, tennis at fifty-two percent, and golf at forty-seven percent, NASCAR’s product-loyal fans “put[] a gleam in every marketer’s eye.”⁴⁸

While cigarettes, beer and auto parts are still a mainstay in racing sponsorship, NASCAR’s sponsorship list has diversified, attracting consumer products like Kodak film, Kellogg’s cereal, Maxwell House coffee, Tide laundry detergent, McDonald’s, Pepsi, and Gatorade.⁴⁹ Prodigy, an on-line computer service, and cable television networks, like the Cartoon Channel and QVC, have joined the frenzy to be a part of the sport.⁵⁰

Corporate sponsorship of NASCAR is expected to grow to \$441 million in

GENDER		OCCUPATION	
Female	38%	Professional/Managerial	27%
Male	62%	Technical/Clerical/Sales	21%
		Craft Precision	13%
		Unskilled Labor	10%
		Other	29%
INCOME		RESIDENCE	
less than \$10,000	7%	Rent	28%
\$10,000-19,999	14%	Own	72%
\$20,000-29,999	17%		
\$30,000-39,999	19%		
\$40,000-49,999	14%		
over \$50,000	29%		
MARITAL STATUS		EDUCATION	
Married	64%	Some High School	12%
Single	22%	Graduated High School	88%
Divorced/Widowed	14%	Some College/Graduated College	38%
EMPLOYMENT		AGE	
Full-time	72%	Under 18	3%
Part-time	10%	18-24 yrs. old	15%
Retired/Unemployed	18%	25-34 yrs. old	29%
		35-44 yrs old.	25%
		45-54 yrs. old	16%
		55 and over	12%

46. Roush, *supra* note 30, at 74.

47. *Id.*

48. *Id.*

49. 1996 *Official Family of Sponsors*, NASCAR PUBLIC RELATIONS MATERIALS.

50. *Marketing of NASCAR Continues to Expand*, *supra* note 32, at B3. The Cartoon Network sponsored race car sports the image of Fred Flintstone. According to Christopher Jones, an official with Turner Broadcasting (Turner owns the Cartoon Network), NASCAR fans are the type of fans that they want to reach. “[NASCAR] appeals to the masses while other sports appeal to the elites. Our characters are working-class characters. Fred [Flintstone] carries a lunch pail to work everyday.” *Id.*

1997, up from \$405 million in 1996.⁵¹ By comparison, all other stadium sports combined generated only \$365 million in corporate support in 1996.⁵² Despite the long line of companies, “such as Proctor & Gamble, DuPont, and McDonald’s [who] vie for the opportunity to splash \$4 million apiece on these 200-mph advertising vehicles,”⁵³ if the tobacco companies are prohibited from pouring cash into NASCAR’s coffers, the sport will definitely feel an impact.⁵⁴ While there is a consensus that racing would feel the impact of a tobacco advertising ban, the severity is unknown.⁵⁵ Moreover, the FDA’s regulations are one more strike against the tobacco industry and the social stigma attached to smoking. Undoubtedly, the real loser from the FDA’s regulations, is not NASCAR, but the tobacco industry.

II. THE FOOD AND DRUG ADMINISTRATION’S REGULATION OF TOBACCO

A. Brief Historical Overview of Tobacco Regulation

Historically, the FDA has taken the position that tobacco regulation is outside of its domain.⁵⁶ The FDA’s predecessor, the Bureau of Chemistry in the

51. Lee Walczak et al., *Speed Sells*, BUS. WK., Aug. 11, 1997, at 86.

52. *Id.*

53. Alex Taylor III, *Can NASCAR Run in Bigger Circles?*, FORTUNE MAG., Feb. 5, 1996, at 38.

54. Locke, *supra* note 26, at 224.

55. *Id.* Hardy Smith, the executive director of the National Motorsports Council, an organization which was formed to lobby on issues which affect the sport of racing, said that under a tobacco advertising ban “[c]ompetition would suffer, and races might be moved from free TV to pay-per view.” *Id.* at 224 n.46 (quoting Liz Clarke, *Will Sponsorship Go Up in Smoke?*, INDIANAPOLIS STAR, Aug. 4, 1994, at E26). *But see* Jeff Jensen, *Non-Tobacco Sponsors Could Fill Motor Void*, ADVERTISING AGE, Sept. 2, 1996, at 34. (“Would it be catastrophic for NASCAR if Winston (tobacco sponsorship) went away? No, it wouldn’t. But that doesn’t mean we aren’t going to fight.”) (quoting John Story, director of public relations for the Daytona International Speedway).

On June 20, 1997, just after the proposed settlement was announced, NASCAR issued an official statement on the recent developments between the tobacco industry and the government.

For nearly 30 years we have had a mutually beneficial relationship with R.J. Reynolds and its Winston brand. We have not had an opportunity to review the proposed agreement so it would be premature to speculate on what effect this will have on motorsports. While the settlement has been announced, it must still face Congressional as well as Presidential review while also facing litigation that has already been filed. NASCAR racing has been in existence for nearly 50 years, long before tobacco companies became actively involved in the sport. With monumental growth we have experienced in recent years, and the anticipated continued growth of motorsports, we will continue to aggressively promote the sport.

NASCAR Tobacco Statement, June 20, 1997 <<http://www.nascar.com>>.

56. U.S. Dep’t. of Health and Human Servs., *FDA’s Proposed Regulation of the Sale and*

Department of Agriculture, announced in 1914 that tobacco, which had not been labeled for “medicinal purposes,” was outside the scope of the Federal Food and Drug Act of 1906.⁵⁷ In 1938, the Federal Food, Drug, and Cosmetic Act (FDCA) was passed.⁵⁸ The FDCA is an enabling statute which provides the FDA with the authority to promulgate regulations.⁵⁹ Under the FDCA, the FDA has the authority to regulate “food,” “drug,” “device,” and “cosmetics” as defined by the statute.⁶⁰ Since its enactment in 1938, tobacco has not been interpreted to fit into any one of these definitions, nor has Congress passed legislation which would give the FDA jurisdiction.⁶¹ However, on August 11, 1995, the FDA, under existing law, issued a proposal which conferred upon themselves the authority to regulate tobacco.⁶² On August 28, 1996, the FDA issued a final rule, *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, which is to become fully effective by February 28, 1998.⁶³

Promotion of Tobacco Products to Minors, Public Health Rep. 1996; 111, 280-85.

57. Whatley, *supra* note 2, at 122.

58. Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301-395 (1994)).

59. Boeckman, *supra* note 2, at 997 n.23. An administrative agency is built upon the foundation of an enabling statute, “so that acts exceeding the scope of the statute are invalid.” *Id.*

60. 21 U.S.C. §§ 321(f) -(i) (1994).

61. Over the years, bills have been introduced in Congress to grant the FDA regulatory authority over tobacco. However, none of these bills, which would have given the FDA jurisdiction via the legislature, have passed. Whatley, *supra* note 2, at 122-25. In 1956, the House rejected a bill that would have amended the FDCA, giving the FDA jurisdiction over cigarettes. *Id.* at 122 (H.R. 11280, 84th Cong., 2nd Sess. (1956)). In 1963, bills were rejected by the House and Senate that would have put smoking products under the FDA’s jurisdiction. *Id.* (H.R. 5973, 88th Cong., 1st Sess. (1963); S. 1682, 88th Cong., 1st Sess. (1963)). In 1964, legislation was introduced once again to give the FDA jurisdiction over tobacco. Instead, Congress passed the Federal Cigarette Labeling and Advertising Act of 1965 to deal with the issue of advertising and labeling with respect to smoking and health. *Id.* at 122-23. In 1972, FDA Commissioner Charles Edwards said at Congressional hearings that “the regulation of cigarettes is to be the domain of Congress . . . and labeling or banning cigarettes is a step that can be taken only by Congress.” *Id.* at 123 (quoting Hearings Before the Consumer Subcomm. of the Senate Comm. on Commerce on S. 1454, 92nd Cong., 2d Sess. (1972)). In 1986, Congress passed the Comprehensive Smokeless Tobacco Health Education Act (CSTHEA) to provide a federal regulatory scheme for the regulation of smokeless tobacco products. *Id.* at 124 (15 U.S.C. §§ 4401-4408 (1994)). The CSTHEA does not grant any jurisdiction to the FDA. *Id.* In 1987, 1989, 1992, and 1993, bills were introduced in Congress attempting to place tobacco products within the reach of the FDA; none of them passed. *Id.* at 124-25 (H.R. 3294, 100th Cong., 1st Sess. (1987); H.R. 1494 and S. 769, 101st Cong., 1st Sess. (1989); H.R. 4350 and S. 2298, 103d Cong., 1st Sess. (1992); H.R. 2147 and S. 672, 104th Cong., 1st Sess. (1993)).

62. Proposed Regulations, *supra* note 16.

63. FDA Regulations, *supra* note 3, at 44,396. The FDA published a 924 page document in two volumes in the August 28, 1996 Federal Register. Book One sets forth the regulation and the

B. The FDA Rule

The purpose behind the FDA Rule is to “restrict[] the sale and distribution of cigarettes and smokeless tobacco to children and adolescents” which will “prevent future generations of Americans from becoming addicted to them [while allowing] the continued marketing of these products.”⁶⁴ The rule will:

- (1) prohibit the sale of nicotine-containing cigarettes and smokeless tobacco to individuals under the age of eighteen;
- (2) require manufacturers, distributors, and retailers to comply with certain conditions regarding the sale and distribution of these products;
- (3) require a retailer to verify a purchaser’s age by photographic identification;
- (4) prohibit all free samples and prohibit the sale of these products through vending machines and self-service displays except in facilities where individuals under the age of eighteen are not present or permitted at any time;
- (5) limit the advertising and labeling to which children and adolescents are exposed to a black-and-white, text-only format;
- (6) prohibit the sale or distribution of brand-identified promotional nontobacco items such as hats and tee shirts;
- (7) prohibit the sponsorship of sporting and other events, teams, and entries in a brand name of a tobacco product, but permit such sponsorship in a corporate name; and
- (8) require manufacturers to provide intended use information on all cigarette and smokeless tobacco product labels and in cigarette advertising.⁶⁵

The FDA asserts that the regulations “will address the serious public health problems caused by cigarettes and smokeless tobacco products;” that they “will reduce children’s and adolescents’ easy access” to tobacco products; and that they will “significantly decrease the amount of positive imagery that makes [tobacco] products so appealing to that age group.”⁶⁶

FDA’s justifications and need for tobacco regulation. Book Two consists of an “Annex” which covers tobacco research and regulation in general.

64. *Id.* at 44,397.

65. *Id.* at 44,396.

66. *Id.*

The FDA predicated their assertion of jurisdiction over tobacco products under the FDCA, by classifying cigarettes and smokeless tobacco as “delivery devices” for nicotine.⁶⁷ The reversal in the FDA’s policy did not come from any change in the law, rather it came from evidence that the tobacco companies control and manipulate the levels of nicotine in tobacco products.⁶⁸ With this ammunition, the FDA classified cigarettes and smokeless tobacco as “combination products consisting of a drug⁶⁹ (nicotine) and device components intended to deliver nicotine to the body.”⁷⁰ The FDA, having the discretion to choose which authority to apply in the regulation of the combination products, “determined that tobacco products are most appropriately regulated under the device provisions of the act.”⁷¹

C. The FDA’s Justification for Imposing a Brand-Name Sponsorship Ban

Under the FDA’s sponsorship ban, “no manufacturer, distributor, or retailer shall sponsor or cause to be sponsored any athletic, musical, artistic or other social or cultural event, in the brand name, logo, motto, selling message, recognizable color or pattern of colors, or any other indicia of a product identification similar or identical to those used for tobacco or smokeless tobacco products.”⁷²

67. *Id.* at 44,400. A “device” is defined as “instruments, apparatus, and contrivances, including their components, parts, and accessories, intended . . . to affect the structure or any function of the body of man.” 21 U.S.C. § 321(h)(3) (1994).

68. U.S. Dep’t. of Health and Human Servs., *supra* note 55, at 280. On December 8, 1996, CBS ran a story featuring David Kessler, the commissioner of the FDA who announced in November, 1996 that he was stepping down from his position as head of the FDA. Through an extensive investigation, Kessler uncovered that tobacco manufacturers were manipulating the nicotine levels in tobacco through genetic and chemical engineering. Kessler discovered a patent filed by Brown & Williamson, a major tobacco manufacturer, that was registered in Brazil, written in Portuguese, and filed in the Netherlands. The patent was for tobacco plants with a six percent nicotine content, twice the level of the highest flue-cured in the U.S. The tobacco plants were grown in Brazil and flown back into the U.S. for manufacture. Kessler also uncovered a manual from Brown & Williamson which described the effect of adding ammonia and other chemicals to tobacco to enhance the effects of nicotine. *60 Minutes: How He Won the War* (CBS television broadcast, Dec. 8, 1996) available in WESTLAW 1996 WL 8065061.

69. A drug is defined as an article other than food which is “intended to affect the structure or any function of the body of man.” 21 U.S.C. § 321(g)(1)(c) (1994). The FDA determined that cigarettes and smokeless tobacco products are “‘drugs’ which produce[] significant pharmacological effects in consumers, including satisfaction of addiction, stimulation, sedation, and weight control.” FDA Regulations, *supra* note 3, at 44397.

70. *Id.* at 44,400.

71. *Id.* For articles examining the statutory interpretation of the FDCA as applied to tobacco regulation and separation of powers issues raised by the FDA’s regulations, see Harder, *supra* note 11 and Boeckman, *supra* note 2.

72. FDA Regulations, *supra* note 3, at 44,527 (codified at 21 C.F.R. 897.34(c) (1996)).

While brand-name sponsorship is prohibited under this rule, a tobacco company may still sponsor an event, team or entry as a corporate sponsor. However, colors and patterns of colors which would be recognizable with a brand name product are not allowed. The product names and logos of cigarettes and smokeless tobacco, such as Winston, Camel, Marlboro, and Skoal, will not be permitted to be plastered on every surface imaginable around the race track. Winston Cup tee shirts and caps, a sight common at every race track, will no longer be permitted to be sold or distributed. Thus, the incentive that a tobacco company will have for sponsoring an event—product recognition—is eliminated.

The FDA asserts that brand-name sponsorship by tobacco companies “associates tobacco use with exciting, glamorous, or fun events such as car racing and rodeos . . . [and] creates a ‘friendly familiarity’ between tobacco and sports enthusiasts, many of whom are children and adolescents.”⁷³ The intentions of the regulations are to “reduce the ‘friendly familiarity’.”⁷⁴ The agency contends that the regulations are drafted narrowly to protect children and adolescents, while “recogniz[ing] the importance of corporate sponsorship in engendering goodwill . . . [by] providing support to sports, the arts, and music.”⁷⁵

While the sponsorship ban would impose an across-the-board ban on all types of tobacco sponsorships, the FDA, in justifying its rule, was clearly concerned about motorsport sponsorships, and NASCAR in particular. Thus, the majority of the regulation concerning the sponsorship ban was directed towards demonstrating the effect of motorsport sponsorship on children under eighteen years old.⁷⁶

The FDA found that the number of children affected by motorsport sponsorship was substantial. The FDA relied on data which showed that 354 motorsport events had a total viewing audience of 915 million people, of which 64.05 million were under the age of eighteen.⁷⁷ This averaged to 180,806 underage television viewers per event.⁷⁸ The FDA also noted that the number of children in actual attendance at racing events “may be growing.”⁷⁹

The FDA claimed that the effect that tobacco sponsorship had on children and adolescents is “enormous.”⁸⁰ The FDA stated that sponsorship creates an “attractive and exciting image” of tobacco products “that can serve as a ‘badge’ or identification,” and because of the prolonged exposure of a product in a sponsored event, “an impression of prevalence and normalcy about tobacco use” is created.⁸¹ They further asserted that children “will repeatedly see and begin

73. *Id.*

74. *Id.*

75. *Id.* at 44,536.

76. *See generally* FDA Regulations, *supra* note 3, at 44,527-44,536.

77. *Id.* at 44,528.

78. *Id.*

79. *Id.* NASCAR reports that only three percent of spectators at NASCAR Winston Cup Races are under eighteen years-old. NASCAR PUBLIC RELATIONS MATERIALS, *supra* note 29.

80. FDA Regulations, *supra* note 3, at 44,528.

81. *Id.* at 44,529.

to associate the event, which they are enjoying, with the imagery and appeal of the product.”⁸²

According to the FDA, children and adolescents “are still forming attitudes and beliefs about tobacco use” and see smoking “as a coping mechanism, a gauge of maturity, a way to enter a new peer group, or as a means to display independence.”⁸³ The rule is intended to break the link between tobacco brand-sponsored events and images and use of tobacco by young people.”⁸⁴

The FDA received criticism that the rule is overly broad and violates the First Amendment.⁸⁵ The rule prohibits brand-name tobacco sponsorships at all events and does “not attempt to differentiate between those events that attract children and adolescents and those that attract adults.”⁸⁶ The FDA did not directly provide a response to this question. Instead, they skirted around the issue by stating that children who attend events are “directly and unavoidably confronted with messages from the sponsoring product” and that viewers on television are made aware of particular brands.⁸⁷ Thus, considering these factors, a sponsorship ban will effectively “limit the influences on children . . . and thus, protect their health.”⁸⁸ The FDA further stated that they were “not aware of any way to limit the restriction to events that are attended by young people.”⁸⁹

III. THE COMMERCIAL SPEECH DOCTRINE

A. Historical Perspective on Commercial Speech

Commercial speech is a doctrine in search of a theory. From the time it showed up on the doorstep in 1942 (and carrying quite a lot of baggage at that), commercial speech has been the poor relation of the

82. *Id.*

83. *Id.* at 44,530.

84. *Id.*

85. *Id.* at 44,533.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 44,534. The FDA seems to be inconsistent in this statement. The FDA has developed a standard which would differentiate among adults and adolescents. In restricting printed advertisements to black and white text only, the FDA proposed a “print media standard” where the “tombstone” ads, to which the black and white text ads are referred, are only applicable to magazines where children comprise at least 15% or two million of the readers. FDA Regulations, *supra* note 3, at 44,513. However, the FDA considered and rejected this proposal for sponsorships. They reasoned that the types of exposure are “dramatically different” because the time spent viewing an advertisement is nine seconds, while during an event, the viewer or spectator is “unavoidably bombarded with posters, signs, hats . . . linked with a fun, exciting, or glamorous event that they enjoy for a prolonged period of time.” *Id.* at 44,529. See *infra* discussion Part IV.D.

*First Amendment family.*⁹⁰

Commercial speech has been defined by the Court as speech that does “no more than propose a commercial transaction.”⁹¹ In 1942, the Supreme Court was first confronted with whether commercial speech was afforded First Amendment protection in *Valentine v. Christensen*.⁹² The Court held that it was not.⁹³ The Supreme Court’s opinion consisted of only two paragraphs, which quickly disposed of the matter by stating that “the Constitution imposes no [First Amendment] restraint on government as respects purely commercial advertising.”⁹⁴ Despite criticism⁹⁵ and apparent inconsistencies,⁹⁶ the Court

90. RICHARD T. KAPLAR, *THE MEDIA INSTITUTE, ADVERTISING RIGHTS THE NEGLECTED FREEDOM: TOWARD A NEW DOCTRINE OF COMMERCIAL SPEECH* 35 (1991).

91. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

92. 316 U.S. 52 (1942). In *Valentine*, Christensen owned a submarine exhibit in New York City. Christensen prepared handbill advertisements soliciting visitors to his submarine for a stated admission. Attempting to distribute the handbills on the streets of New York, Christensen was told that this activity violated the Sanitary Code, which prohibited the distribution of commercial and business advertisements in the streets. Subsequently, Christensen made two-sided handbills. One side contained an advertisement for his submarine, the other contained a protest with no commercial advertisement. The police restrained Christensen from distributing the new handbills. The Court was unpersuaded by the fact that Christensen printed a protest on one side of the handbill. The Court concluded that the affixing of the protest to the commercial handbill “was with the intent, and for the purpose, of evading the prohibition of the ordinance.” *Id.* at 55.

93. *Id.*

94. *Id.* at 54. The Court was only partially correct in this statement. The First Amendment is silent with respect to commercial advertising and its relationship to the First Amendment. Thus, this issue is not as black and white as the Court makes it seem. See KAPLAR, *supra* note 89, at 36-46 (discussion of whether the founders intended to protect commercial speech); see also Locke, *supra* note 26, at 240 (“[w]hile it is reasonable to assume that the Founding fathers did not intend the First Amendment to shield speech which inflicts injury or is calculated to incite immediate breaches of the peace, it is less clear that the Amendment . . . allow[s] courts to weigh the value of certain categories [other than ‘fighting words’]. In the case of tobacco sports advertising and promotion, the speech itself does not trigger the expected harm . . . of the ‘fighting words’ doctrine; rather, [it is] only indirectly related to the interest of the government in preventing illness and disease.”).

95. Justice Douglas said in 1959 that the *Valentine* “ruling was causal, almost offhand. And it has not survived reflection.” KAPLAR, *supra* note 89, at 18 (quoting *Cammarano v. U.S.*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring)).

96. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the *Times* published an advertisement that allegedly injured the reputations of certain public officials. The Court held that the advertisement was afforded First Amendment protection because it communicated “claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public concern.” *Id.* at 266. Bradford W. Scharlott criticized the Court’s decision, stating that in principle the *Times* case was no different than *Valentine*. Scharlott stated

followed this doctrine for thirty-three years, holding that commercial speech received no protection under the First Amendment.⁹⁷ However, in 1975, the Court modified their position by reformulating a test for determining whether commercial speech was within the ambit of the First Amendment. The Court in *Bigelow v. Virginia*⁹⁸ held that *Valentine* “obviously does not support any sweeping proposition that advertising is unprotected *per se*,”⁹⁹ rather, the constitutionality of commercial speech should be “assess[ed] [by] the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.”¹⁰⁰

In 1976, the commercial speech doctrine reached its “high-water mark”¹⁰¹ in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁰² The Court strengthened its revised position on commercial speech, holding that just because the “the advertiser’s interest is a purely economic one,” that does not “disqualif[y] him from protection under the First Amendment.”¹⁰³ In *Virginia Board of Pharmacy*, Virginia consumers challenged a state statute that prohibited the advertisement of prices for prescription drugs.¹⁰⁴ A U.S. District Court struck down the statute,¹⁰⁵ and Justice Blackmun writing for the Supreme Court upheld the district court’s ruling.¹⁰⁶

Virginia Board of Pharmacy was significant because the issues dealt squarely with a commercial transaction and did not contain any other underlying concerns. As the Court stated:

Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or litical. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The “idea” he wishes to communicate is simply

that “[i]n both cases, the advertisers had a commercial goal, but also expressed grievances.” Bradford W. Scharlott, *The First Amendment Protection of Advertising in the Mass Media*, in ADVERTISING AND COMMERCIAL SPEECH, 4 (Hon. Theodore R. Kupferman ed., 1990). Yet, the outcome was completely different. Scharlott characterized the *Valentine* test as “deficient” because it produced “an all-or-nothing” outcome—the advertisement either received full First Amendment protection or it received none. *Id.*

97. See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955).

98. 421 U.S. 809 (1975).

99. *Id.* at 820.

100. *Id.* at 826. In *Bigelow*, the Court held that a statute which prohibited all abortion advertisements was unconstitutional. The Court reasoned that the advertisements “did more than simply propose a commercial transaction. [The advertisements] contained factual material of clear ‘public interest.’” *Id.* at 822.

101. KAPLAR, *supra* note 89, at 22.

102. 425 U.S. 748 (1976).

103. *Id.* at 762.

104. *Id.* at 749-50.

105. *Id.* at 750.

106. *Id.* at 773.

this: “I will sell you the X prescription drug at the Y price.” Our question, then, is whether this communication is wholly outside the protection of the First Amendment.¹⁰⁷

In holding that a pure commercial transaction is afforded First Amendment protection, the Court reasoned that “speech does not lose its First Amendment protection because money is spent to project it.”¹⁰⁸ The Court broke “new ground” by holding that “[if] there is a right to advertise, there is a reciprocal right to receive the advertising.”¹⁰⁹ Despite “however tasteless and excessive” advertising may be, the Court said that it is “nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. . . . To this end, the free flow of commercial information is indispensable.”¹¹⁰

Despite what appeared to be victory for the constitutional protection of commercial speech, in what appears almost as an afterthought, in a footnote near the end of the opinion, the Court “held that commercial speech is entitled to only a second-class level of First Amendment protection.”¹¹¹ The Court stated that even though commercial speech is afforded protection under the First Amendment, “[t]here [are] some commonsense differences between speech that does ‘no more than propose a commercial transaction’ and other types of speech which ‘suggest that a different degree of protection is necessary.’”¹¹² Thus, commercial speech enjoyed “a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”¹¹³

Although *Virginia Board of Pharmacy* established that commercial speech was afforded constitutional protection, in 1980 the Court formulated a four part test in *Central Hudson Gas & Electric v. Public Service Commission of New York*¹¹⁴ to determine if, despite First Amendment protection, commercial speech could be regulated.

B. Central Hudson

In *Central Hudson* the Court established the framework for the modern analysis of commercial speech, promulgating a four part test to determine

107. *Id.* at 761.

108. *Id.*

109. KAPLAR, *supra* note 89, at 21 (quoting *Virginia Board of Pharmacy*, 425 U.S. at 757).

110. *Virginia Board of Pharmacy*, 425 U.S. at 765.

111. Scharlott, *supra* note 95, at 6.

112. *Virginia Board of Pharmacy*, 425 U.S. at 772 n.24. See KAPLAR, *supra* note 89.

113. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). In *Went For It*, lawyers brought action to challenge the constitutionality of the Florida Bar rules which prohibit lawyers from using direct mail to solicit personal injury or wrongful death clients within thirty days of the accident. The statute was upheld as lawyer solicitation was found to be commercial speech subject to intermediate scrutiny. *Id.*

114. 447 U.S. 557 (1980).

whether the speech should be afforded constitutional protection.¹¹⁵ The threshold inquiry is whether (1) the communication is misleading or unlawful.¹¹⁶ If the answer is yes, then the inquiry stops and the regulation is upheld.¹¹⁷ However, if the activity is lawful and the communication is not misleading, then (2) the government must assert a “substantial interest;”¹¹⁸ (3) the regulation must “directly advance” the government’s interest;¹¹⁹ and (4) the regulation must be “no more extensive than necessary” to further the government’s interest.¹²⁰

In 1973, the New York Public Service Commission ordered all electric utilities in New York state “to cease all advertising that “promot[ed] the use of electricity.”¹²¹ Due to the fuel shortage, the commission was concerned that there was not enough fuel to meet customers’ demands during the 1973-74 winter. After the fuel shortage ended, the commission extended the prohibitions on advertising in a Policy Statement issued February 25, 1977. The Policy Statement divided advertising into two categories: (1) “promotional—advertising intended to stimulate the purchase of utility services,” and (2) “institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.”¹²² Institutional and informational advertising was allowed; however, all promotional advertising was banned. The Commission reasoned that promotional advertising was “contrary to the national policy of conserving energy.”¹²³

Central Hudson challenged the Commission’s order, arguing that the advertising ban “restrained commercial speech in violation of the First and Fourteenth Amendments.”¹²⁴ The order was upheld at the trial court and at the intermediate appellate level.¹²⁵ The New York Court of Appeals affirmed both courts, holding that “the governmental interest in the prohibition outweighed the limited constitutional value of the commercial speech at issue.”¹²⁶ The Supreme

115. Richard T. Kaplar likened the *Central Hudson* test to a “patchwork quilt” where the Court’s previous decisions were finally piece-mealed together into one opinion. Kaplar notes that the *Central Hudson* opinion “bore a stronger resemblance to *Bigelow*, with its emphasis on the balancing of competing values, than to *Virginia Pharmacy Board*’s reliance of the primacy of the First Amendment.” KAPLAR, *supra* note 89, at 23.

116. *Central Hudson*, 447 U.S. at 563. The Court stated that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public” or to “commercial speech related to illegal activity.” *Id.* at 563-64.

117. *Id.* at 563.

118. *Id.* at 564.

119. *Id.*

120. *Id.* at 569-70.

121. *Id.* at 558.

122. *Id.* at 559.

123. *Id.*

124. *Id.* at 560.

125. *Id.* at 560-61.

126. *Id.* at 561.

Court granted *certiorari* and reversed.¹²⁷

Initially, the Court observed that it has previously “rejected the ‘highly paternalistic’ view that government has complete power to suppress or regulate commercial speech” because “[p]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them”¹²⁸ However, the Court noted the “commonsense” distinction between commercial speech and other types of speech and held that the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”¹²⁹

In applying the four part test, the Court found that the advertising was commercial speech that was protected by the First Amendment, thus, satisfying the first prong.¹³⁰ The Court also held that the Commission asserted a substantial state interest and that the regulation directly advanced the state interest.¹³¹ However, with respect to the fourth prong, the Court held that the advertising ban was more extensive than necessary; thus, the regulation failed.¹³²

C. “In Search of a Theory”

The commercial speech doctrine is in a state of uncertainty. While the *Central Hudson* test has not been overruled, the Court has struggled to find a consistent application of the test.¹³³ In all but expressly overruling a 1986

127. *Id.*

128. *Id.* at 562 (citations omitted).

129. *Id.* at 562-63.

130. *Id.* at 567. The Commission did not claim that the communication was unlawful or misleading. Despite arguments that the speech was not protected because *Central Hudson* held a monopoly in electric service, the Court held otherwise because “a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business.” *Id.*

131. The Commission asserted two state interests: (1) the need for energy conservation, and (2) an equitable rate structure for utility costs. *Id.* at 568-69. The Court found that these interests were substantial and that the state’s interest in energy conservation was “directly advanced” by the restrictions. *Id.* at 569.

132. *Id.* at 570. The Court reasoned that the “commission failed to show that ‘its interest in conservation cannot be protected adequately by more limited regulation of appellant’s commercial expression.’” *Id.* The Court suggested that the Commission could “require that the advertisements include information about the relative efficiency and expense of the offered service” *Id.* at 571. The Court further explained what was required for the fourth prong to be satisfied in a 1989 decision.

What our decisions require is a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends,”—a fit that is not necessarily perfect, but reasonable; . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (citations omitted).

133. The Court has stated that all that was required with respect to the third and fourth prongs was a “reasonable fit.” However, in subsequent cases, the Court warned that “the restrictions must

decision,¹³⁴ the Supreme Court has changed its position on commercial speech and appears ready to depart from *Central Hudson* and afford commercial speech more protection.

1. *Posadas de Puerto Rico Associates v. Tourism Company*.¹³⁵—In *Posadas*, the Court seemed to defer to the judgment of the legislature and afforded less constitutional protection to advertisements of “vice” activities. In *Posadas*, the operator of a Puerto Rican casino challenged a statute which restricted advertising of casino gambling aimed at Puerto Rican residents, but permitted advertising directed towards tourists. The Court applied the *Central Hudson* test and affirmed the Supreme Court of Puerto Rico’s decision holding the statute facially constitutional.¹³⁶ The Court held that the commercial speech was neither unlawful nor misleading and that Puerto Rico had a substantial interest in the “health, safety, and welfare of its citizens”¹³⁷ However, with respect to the third and fourth prongs of the *Central Hudson* test, the Court deferred to the judgment of the legislature in holding that they were satisfied.¹³⁸ The effect of this decision is significant because the two most difficult prongs to satisfy were substantially weakened.¹³⁹

be ‘narrowly tailored,’ cannot ‘burden substantially more speech than necessary, and that the existence of numerous and obvious less-burdensome non-speech alternatives is a ‘relevant consideration’ in determining whether a reasonable ‘fit’ exists.” Michael W. Field, *On Tap*, 44 *Liquormart, Inc. v. Rhode Island: Last Call for the Commercial Speech Doctrine*, 2 *ROGER WILLIAMS U. L. REV.* 57, 70 (1996) (citations omitted).

134. *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

135. *Id.*

136. *Id.* at 348.

137. *Id.* at 341. The Puerto Rican legislature believed that casino gambling among the local residents would increase crime, prostitution, and corruption. *Id.*

138. *Id.* at 341-44. With respect to whether the advertising restrictions directly advanced the government’s interest, the Court stated “The Puerto Rico Legislature obviously believed . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature’s belief is a reasonable one. . . .” *Id.* at 341-42. The Court also deferred to the legislature’s judgment that the regulations were no more extensive than necessary. The Court held that it was up to the legislature to decide if other measures would be as effective in furthering the state’s interest as an advertising restriction. *Id.* at 344. *But see* *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (in striking down a ban on in-person solicitation by CPAs, the Court did not defer to the government when it held that the Board of Accountancy failed to sustain its burden of showing that the restriction directly advanced the asserted substantial interest).

139. In the *Posadas* decision, the Court abandoned its “least restrictive alternative analysis” in favor of a “rational basis” standard of review for the fourth prong. David D. Vestal, *The Tobacco Advertising Debate: A First Amendment Perspective*, *ADVERTISING AND COMMERCIAL SPEECH* 140, (Hon. Theodore R. Kupferman ed., 1990). “[T]he casino advertising ban . . . should have failed the fourth prong of *Central Hudson*.” *Id.* at 139. However, the Court adopted a “relaxed standard” because Puerto Rico was not required to show that other least restrictive alternatives would be ineffective. *Id.* at 140.

Perhaps even more damaging to the commercial speech doctrine is what Justice Rehnquist wrote after applying the *Central Hudson* analysis. In apparently adopting the “greater-includes-the-lessor” rationale,¹⁴⁰ Justice Rehnquist wrote that “it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.”¹⁴¹ This seems to “add[] another dimension to the test of restrictions on commercial speech . . . if the underlying conduct is not protected, the [government] apparently has great latitude in the regulation of advertising about it.”¹⁴² In *United States v. Edge Broadcasting Co.*,¹⁴³ the Court held that “the activity underlying the relevant advertising—gambling—implicates no constitutionally protected right; rather, it falls into a category of ‘vice’ activity that could be . . . banned altogether.”¹⁴⁴ Thus, as this theory applies to tobacco, unquestionably a vice product, if the government has the authority to completely ban the sale of tobacco products, then it implicitly has the authority to restrict its advertising and promotion. While the FDA asserts that it has the authority to completely ban the sale of tobacco,¹⁴⁵ neither Congress, nor any court, has given it that authority.¹⁴⁶

2. *44 Liquormart, Inc. v. Rhode Island*.¹⁴⁷—A 1996 Supreme Court decision seems to have disavowed a majority of the *Posadas* opinion and afforded commercial speech its most protection since *Virginia Board of Pharmacy*. In *44 Liquormart*, all nine justices agreed that a state ban on advertising the prices of liquor was unconstitutional.¹⁴⁸ Although it was a plurality opinion, the

140. Under this rationale, the argument is that since the government has the greater power to ban the sale of a product, logically, that includes the lesser power to allow sales but with tighter restrictions. Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 599-600 (1996) (arguing that the “greater-includes-the-lessor” rationale should not be a factor in First Amendment jurisprudence because its “‘greater-includes-the-lessor’ logic, when used in this context, actually stands the Constitution on its head.”).

141. *Posadas*, 478 U.S. at 346.

142. Denise M. Trauth & John L. Huffman, *The Commercial Speech Doctrine*, ADVERTISING AND COMMERCIAL SPEECH 99, 111 (Hon. Theodore R. Kupferman ed., 1990).

143. 509 U.S. 418 (1993).

144. *Id.* at 426.

145. Harder, *supra* note 11, at 416 (citing 60 Fed. Reg. 41,355 (1995)). The FDA in its proposed rule stated that “it could have banned the sale or distribution of [tobacco products].” *Id.*

146. *Id.* at 415. Even if a court finds that the FDA has the authority to completely ban the sale of tobacco, *Posadas* is distinguishable because the FDA promulgated the regulations as a federal agency, where the regulation in *Posadas* was passed by the legislature. *Id.* at 416 n.117.

147. 116 S. Ct. 1495 (1996).

148. The Rhode Island ban prohibited vendors licensed in the state or out-of-state manufacturers, wholesalers, and shippers from “‘advertising in any manner whatsoever’ the price of any alcoholic beverage offered for sale in the State; the only exception is for price tags or signs displayed with the merchandise within licensed premises and not visible from the street.” *Id.* at 1501. The ban also prohibited publication or broadcast of any advertisements that “make reference

importance of *44 Liquormart* rests in the laying of the foundation by the Justices to abandon sixteen years of precedent following *Central Hudson*.¹⁴⁹

Delivering the principle opinion of the Court, Justice Stevens, joined by Justice Kennedy and Justice Ginsberg, rejected the argument that all commercial speech regulations are subject to the same level of review.¹⁵⁰ Justice Stevens stated that when advertising is regulated to protect consumers from deceptive and misleading advertising, then the regulation will be subject to “less than strict review.”¹⁵¹ However, when truthful, non-misleading messages are prohibited “for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”¹⁵² Stevens proceeded to warn of the dangers created by governmental paternalism, stating that bans against truthful, non-misleading commercial speech usually occur because the government assumes “that the public will respond ‘irrationally’ to the truth.”¹⁵³ However, “[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”¹⁵⁴

Justice Stevens, joined by Justices Kennedy, Souter, and Ginsberg, reviewing the ban under the “strict review” standard, held that despite Rhode Island’s substantial interest in promoting temperance, the ban failed to directly advance the state’s interest and it failed to satisfy the requirement that the restriction on speech be “no more extensive than necessary.”¹⁵⁵ Justice Stevens stated that with respect to the fourth prong of the *Central Hudson* test, that if any non-speech alternative exists that would be more likely to achieve the state’s substantial interest, then the regulation must fail.¹⁵⁶ Because non-speech alternatives almost always exist, the fourth prong of the *Central Hudson* test would rarely be satisfied.¹⁵⁷ Therefore, its usefulness may be short-lived.

Justices Stevens, Kennedy, Thomas, and Ginsberg also disavowed three critical aspects of *Posadas* which gave the government more freedom to regulate commercial speech. First, the Court held that *Posadas* “clearly erred in concluding that it was ‘up to the legislature’ to choose suppression over a less

to the price of any alcoholic beverages.” *Id.*

149. Field, *supra* note 131, at 70.

150. *44 Liquormart*, 116 S. Ct. at 1507.

151. *Id.*

152. *Id.*

153. *Id.* at 1508.

154. *Id.*

155. *Id.* at 1510.

156. *Id.* To reduce consumption and promote temperance, Justice Stevens noted that higher prices (the effect the advertising ban would have had on alcohol) could be achieved by direct regulation or increased taxes, or that educational campaigns could be implemented to discourage consumption. *Id.* Applying strict review to the fourth prong will result in a “least restrictive means test,” something that at least three members of the Court seem willing to do in commercial speech cases for the first time. Field, *supra* note 131, at 76.

157. Field, *supra* note 131, at 76.

speech-restrictive policy.”¹⁵⁸ Second, the Court rejected the “greater-includes-the-less” theory because, contrary to the *Posadas* opinion, a ban on speech is sometimes more intrusive than banning conduct.¹⁵⁹ With respect to constitutional priorities, the Court noted that the right to free speech is valued more than conduct because of the “essential role that the free flow of information plays in a democratic society.”¹⁶⁰ Finally, the Court rejected Rhode Island’s argument that there should be a “vice” exception to the commercial speech doctrine.¹⁶¹ The Court recognized the slippery slope of carving such an exception because of the difficulty in defining what constituted a vice activity. “Almost any product that poses some threat to public health or public morals might reasonably be characterized . . . as relating to a ‘vice activity.’”¹⁶² Furthermore, the effect of such an exception would allow the government to “justify censorship by the simple expedient of placing the ‘vice’ label on selected lawful activities”¹⁶³

Justice Thomas, in his concurring opinion, was the most critical of the existing commercial speech doctrine. Thomas wrote that when the government attempts to keep legal users of a product ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* test should not be applied; rather, the government’s interest should be “per se illegitimate.”¹⁶⁴ Thomas stressed the importance of free dissemination of information in a democratic society, the anti-paternalistic premises of the First Amendment, and the inappropriateness of manipulating consumer choices through the suppression of accurate commercial information.¹⁶⁵ Justice Thomas refused to join the principle opinion applying the *Central Hudson* test because he believed that it should not be used in this case.¹⁶⁶ He urged the Court to abandon *Central Hudson* and follow the doctrine in *Virginia Pharmacy Board* which states “that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.”¹⁶⁷

158. *44 Liquormart*, 116 S. Ct. at 1511.

159. *Id.* at 1512.

160. *Id.*

161. *Id.* at 1513.

162. *Id.*

163. *Id.*; see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 n.2 (1995) (rejecting the government’s argument that legislatures have greater latitude in regulating speech “that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech”).

164. *44 Liquormart*, 116 S. Ct. at 1516 (Thomas, J., concurring).

165. *Id.* at 1517.

166. *Id.* at 1518. Thomas noted that both Justices Stevens and O’Connor adopted a stricter approach in applying the fourth prong of the *Central Hudson* test than in previous opinions. Thomas stated that these opinions “commit the courts to striking down restrictions on speech whenever a direct regulation (i.e., a regulation involving no restriction on speech regarding lawful activity at all) would be an equally effective method of dampening demand by legal users.” *Id.* at 1519. Thomas concluded that “virtually all restrictions with such a purpose would fail the fourth prong of the *Central Hudson* test.” *Id.*

167. *Id.* at 1520.

Justice O'Connor's concurring opinion, joined by Chief Justice Rehnquist, and Justices Souter and Breyer, decided this case "more narrowly" by applying the *Central Hudson* test.¹⁶⁸ Nevertheless, O'Connor held that the advertising ban failed the fourth prong because the fit between Rhode Island's method and its goal was not reasonable.¹⁶⁹ O'Connor's opinion implicitly adopts a stricter standard for the fourth prong of the *Central Hudson* test. O'Connor struck down the advertising ban because there were alternatives at the state's disposal which would have achieved the same goal without infringing on speech.¹⁷⁰ Thus, it seems that the Court will no longer hold that a method of impinging speech is a "reasonable fit" if there are alternatives available that do not intrude upon the ability to provide truthful, non-misleading information.

IV. THE BAN ON BRAND-NAME TOBACCO SPONSORSHIP IS UNCONSTITUTIONAL UNDER COMMERCIAL SPEECH JURISPRUDENCE

While there is little question that *44 Liquormart* has weakened the vitality of *Central Hudson*,¹⁷¹ the Court has not adopted a new analytical framework for commercial speech. Therefore, Part Four of this Note will use *Central Hudson* as the principle analytical tool in assessing the constitutionality of the FDA's restrictions on brand-name tobacco sponsorship, keeping in mind the impact *44 Liquormart* has had on the commercial speech doctrine.

A. Brand-Name Tobacco Sponsorships Are Lawful and Not Misleading

Brand-name tobacco sponsorships must be lawful and not misleading in order to receive First Amendment protection.¹⁷² Tobacco is a legal product in the United States, and the sponsorship of events is a legal activity. On its face, event sponsorship by brand-name tobacco products appears not to be deceptive or misleading. For example, in the NASCAR Winston Cup Series, Winston does not make an attempt to promote cigarettes by making any claims about the benefits of smoking, or stating reasons why a person should buy Winston cigarettes. The Winston name and logo is what is being promoted. Furthermore, the advertisement of tobacco is no more misleading or deceptive than the advertisement of many other products. For example, tobacco advertisements do not mention the adverse consequences associated with tobacco use; however, butter manufacturers do not mention the adverse health consequence of butter in their advertisements either.¹⁷³ Thus, the commercial message that is put forth is not deceptive or misleading, and should receive First Amendment protection.

The FDA argues that since it is illegal in all fifty states for persons under the

168. *Id.* at 1521.

169. *44 Liquormart*, 116 S. Ct. at 1521 (O'Connor, J., concurring).

170. *Id.*

171. See generally Field, *supra* note 131 (arguing that the Court is ready to abandon *Central Hudson* and that commercial speech should be afforded full First Amendment protection).

172. *Central Hudson*, 447 U.S. at 563-64.

173. Stoner, *supra* note 44, at 654.

age of eighteen to purchase tobacco, then the advertisement of tobacco products is not a lawful activity when advertisements are directed towards persons under the age of eighteen.¹⁷⁴ In making its argument, the FDA relies on the well-established principle that commercial speech “related to” unlawful activity does not merit First Amendment protection.¹⁷⁵ The FDA asserts that tobacco advertising is “related to” an illegal activity in two respects.¹⁷⁶ First, tobacco advertisements propose a commercial transaction that do not differentiate between adult and minor purchasers.¹⁷⁷ Therefore, because it is unlawful for minors to purchase tobacco products in all fifty states, the undifferentiated tobacco advertisements, “at least in part,” are unlawful.¹⁷⁸ Second, tobacco advertisements are “related to” an unlawful activity. Advertising has a “powerful appeal” to children and affects their decision to use tobacco, which generates an attempt to purchase cigarettes.¹⁷⁹ Because it is unlawful for minors to purchase cigarettes, tobacco advertising “can appropriately be viewed as encouraging, and thus being ‘related to’ an illegal activity.”¹⁸⁰ The FDA contends that it should be afforded the discretion to differentiate between advertising that “relates to” children, which it claims is unlawful, and advertising that does not.¹⁸¹

The FDA’s reasoning does not stand on solid ground. With respect to the argument that tobacco advertisements are unlawful, the FDA provided no solid evidence for support of this claim. In fact, the only data the FDA provided to support this contention was the number of cigarettes that children and adolescents smoke each year.¹⁸² Because of these statistics, the FDA asserts that

174. FDA Regulations, *supra* note 3, at 44,471.

175. *Id.* (citing *44 Liquormart*, 116 S. Ct. at 1505 n.7) (“By contrast, the First Amendment does not protect commercial speech about unlawful activities.”); *Florida Bar v. Went For It*, 515 U.S. 618, 623-24 (1995) (“Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading.”); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (“The State may also prohibit commercial speech related to illegal behavior.”); *Central Hudson*, 447 U.S. at 563-64 (“The government may ban . . . commercial speech related to illegal activity.” (citations omitted)).

176. FDA Regulations, *supra* note 3, at 44,471.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* The FDA relied on Justice Stevens’ opinion in *44 Liquormart* which distinguished *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). The Court in *Edge* upheld a statute which prohibited lottery advertisements by a broadcaster who was licensed in a state where lotteries were illegal. *Edge Broad.*, 509 U.S. at 435. In *44 Liquormart*, Justice Stevens stated that the statute in *Edge* “was designed to regulate advertising about an activity that had been deemed illegal in the jurisdiction in which the broadcaster was located,” as compared to *44 Liquormart*, where the statute “targets information about entirely lawful behavior.” FDA Regulations, *supra* note 3, at 44,472 (citing *44 Liquormart*, 116 S. Ct. at 1511). The FDA contends that this is the same type of distinction that it is drawing with respect to tobacco advertising. *Id.*

182. *Id.* at 44,471.

in a “practical sense” tobacco advertising is unlawful.¹⁸³ However, the fact that children are consuming an extraordinary amount of tobacco each year does not make tobacco advertising unlawful. By providing statistics on the number of underage smokers, the FDA underscores a serious problem in society; it does not, however, provide a nexus between the prevalence of underage smoking and the illegality of tobacco advertisements.

The FDA also faults the tobacco industry for not differentiating between adults and minors in advertisements. The failure to do so, according to the FDA, results in an unlawful activity when the product is advertised. This reasoning is also faulty. First, it is the *sale* of tobacco to minors that is illegal, not the advertisement of tobacco products. Second, it is absurd to suggest that tobacco manufacturers are obligated to expressly differentiate between adults and children in its advertisements. Is the FDA suggesting that tobacco manufacturers must explicitly state in its advertisements that the message is only targeted to the lawful users of the product? Beer advertisements do not. Does this mean that every beer commercial on television is illegal? Under the FDA’s logic, it seems that they would be. Beer commercials or lottery advertisements would be unlawful activities because only adults can drink alcohol or play the lottery, yet those advertisements do not attempt to differentiate between minors and adults.

The greater effect of the FDA’s logic would be to make the advertisement of nearly every “vice” product an unlawful activity. Most vice activities are restricted to adults, and under the FDA’s reasoning, advertising of such products would be unlawful and therefore could be heavily regulated. This is in direct contradiction to the Court’s ruling in *44 Liquormart* that “vice activities” are not afforded less protection¹⁸⁴ and with the well-established position that the Court has taken against governmental paternalism.¹⁸⁵

Although advertisements that promote adult activities may be appealing to

183. *Id.*

184. See *supra* Part III.C; see also Mark R. Ludwikowski, *Proposed Government Regulation of Tobacco Advertising Uses Teens to Disguise First Amendment Violations*, 4 COMMLAW CONSPPECTUS 105, 110 (1996) (“There is little merit in asserting that First Amendment protection should not be accorded commercial speech that advertises a legal but harmful product.”).

185. *44 Liquormart*, 116 S. Ct. at 1517 n.2 (Thomas, J., concurring); see also *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364-65 (1977); *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1979); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561-62 (1980); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 79 (1983) (Rehnquist, J., for two Justices, concurring); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985); *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 350-51 (1986) (Brennan, J., for three Justices, dissenting); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421-22 n.17 (1993); *Edenfield v. Fane*, 507 U.S. 761, 767, 770, (1993); *United States v. Edge Broad. Co.*, 509 U.S. 418, 437-39 & nn.1, 3 & 4 (1993) (Stevens, J., for two other Justices, dissenting); *Ibanez v. Florida Dept. of Business & Professional Regulation*, 512 U.S. 136, 140-45 (1994); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (Stevens, J., concurring); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 638-39 (1995) (Kennedy, J., for four Justices, dissenting).

children and adolescents, as well as to adults, this is not a sufficient reason to justify a sponsorship ban. In *Bolger v. Youngs Drug Products Corporation*, the Court held that “the government may not ‘reduce the adult population . . . to reading only what is fit for children.’”¹⁸⁶ The tobacco industry noted that it is “the cartoon form of Joe Camel that causes people to mistakenly believe that Joe Camel is child-oriented.”¹⁸⁷ Many adult-oriented products use cartoon figures to promote their products, like “the Pink Panther for fiberglass insulation, Garfield the Cat for a hotel chain, Mr. Clean for household products, and the Peanuts characters for life insurance.”¹⁸⁸ The Joe Camel campaign has proven effective in reaching the eighteen to twenty-four year-old audience, an audience which can lawfully purchase tobacco.¹⁸⁹ Prohibiting advertisements of potentially harmful products on the basis that they are appealing to children will produce inconsistent and unpredictable results. “It is not improbable to suspect that a ban on tobacco advertising will lead to gags on manufacturers of other products that at any given time may be considered politically incorrect.”¹⁹⁰

The FDA should not be afforded the discretion to determine which advertising “relates to” children. The danger of giving the FDA discretion to make such a determination is apparent from its regulations on brand-name sponsorship. Those regulations fail to make any distinction with respect to whether the event consists of primarily an adult audience or an audience with a substantial number of children. The brand-name sponsorship ban applies equally to all events. Thus, either the FDA is saying all sponsored events “relate to” children and adolescents, which is clearly wrong,¹⁹¹ or the FDA has shown that it is unable to determine which advertising “relates to” children and adolescents so they imposed a complete brand-name sponsorship ban. Either way, the FDA has demonstrated that it should not be afforded the discretion to make this determination.

Although the FDA did not expressly state that tobacco advertising is misleading, they did hint that it might be.¹⁹² The FDA stated that children and adolescents are “very impressionable and therefore vulnerable to the sophisticated marketing techniques employed by the tobacco industry, techniques that associate the use of tobacco products with excitement, glamour, and independence.”¹⁹³ Nevertheless, it is unlikely that a court will find it to be so.¹⁹⁴

186. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

187. FDA Regulations, *supra* note 3, at 44479.

188. *Id.*

189. *Id.* Joe Camel advertisements were placed in *Cycle World*, *Penthouse*, *Gentleman's Quarterly*, and *Road and Track*. *Id.* Camel's market share among 18 to 24 year-olds increased from 3.2% in 1986, the year before the inception of Joe Camel, to 10.1% in 1994. *Id.*

190. Ludwikowski, *supra* note 178, at 110.

191. See discussion *infra* Part IV.D.

192. FDA Regulations, *supra* note 3, at 44,398.

193. *Id.*

194. Ludwikowski, *supra* note 178, at 111.

It would be difficult to identify the criteria to determine whether advertisements were aimed at seventeen year-olds, who are prohibited from purchasing tobacco, or at nineteen year-olds, who can legally purchase tobacco.¹⁹⁵ Furthermore, the requirement of warning labels on packages effectively counters “any misleading effects of tobacco advertising.”¹⁹⁶ The FDA did not predicate their regulation of tobacco advertising solely on it being unlawful or misleading, therefore the regulations must satisfy the remaining three prongs of the *Central Hudson* test.

B. The FDA’s Interest Is Substantial

The FDA’s interest in protecting children and adolescents from the hazards of tobacco is substantial.¹⁹⁷ The cost of smoking-related illnesses and death were calculated to be in excess of \$68 billion in 1990, including \$20.8 billion in direct health care costs, \$6.9 billion in morbidity costs, and \$40.3 billion in lost future earnings due to premature death.¹⁹⁸ Furthermore, it is estimated that one million persons under the age of eighteen start smoking each year.¹⁹⁹

The FDA’s asserted interest in protecting children and adolescents is consistent with other interest which courts have held to be substantial. These include energy conservation,²⁰⁰ esthetics of a city,²⁰¹ and the ill effects of gambling on residents.²⁰² Considering the serious consequences of smoking and the great costs it imposes on society, the aforementioned interests pale in comparison to the substantial interest in reducing underage smoking. Additionally, in *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*,²⁰³ the Fourth Circuit held that “reducing cigarette consumption by

195. *Id.*

196. *Id.*

197. The title of the FDA’s rule is *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*. However, in the text of the rule, the FDA states the substantial interest as “protecting the public health.” FDA Regulations, *supra* note 3, at 44,472. While this may seem to be an insignificant distinction because the health of the general population would seem to be as much of a substantial interest than that of children, this statement seems to reveal that the FDA is less concerned with underage use of tobacco products than it is with tobacco use in general. However, by asserting that the protection of children and adolescents as their substantial interests, the FDA can effectively avoid the problem of being too paternalistic. See, e.g., *Action for Children’s Television v. FCC*, 58 F.3d 654, 661 (D.C. Cir. 1995); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 64 U.S.L.W. 4706 (1996).

198. FDA Regulations, *supra* note 3, at 44572 (citing Statement of Clyde Behney and Maria Hewitt on Smoking-Related Deaths and Financial Costs: Office of Technology Assessment Estimates for 1990 Before the Senate Finance Committee 2 (April 28, 1994)).

199. *Id.*

200. *Central Hudson*, 447 U.S. at 569.

201. *Cincinnati v. Discovery Network*, 507 U.S. at 416.

202. *Posadas*, 478 U.S. at 341.

203. 63 F.3d 1318 (4th Cir. 1995), *vacated sub nom.* *Penn Advertising, Inc. v. Schmoke*, 116

minors constitutes a substantial public interest.”²⁰⁴ Furthermore, that the sale of tobacco products is illegal in all fifty states strongly suggests that the interest in underage smoking is more than substantial, it is irrefutable.²⁰⁵ Therefore, the second prong of the *Central Hudson* test is satisfied.

C. The FDA’s Regulations May Not Directly Advance Its Asserted Interest

The FDA’s contention that the advertising restrictions will directly advance their interest stands on tenuous grounds. Under the third prong of the *Central Hudson* test, the FDA must prove that the advertising restrictions will directly advance their asserted interest to a “material degree.”²⁰⁶ While the Court has shown great deference to the legislature in years past,²⁰⁷ the Court has departed from that approach and now seems to require evidence which is more than “speculation or conjecture,”²⁰⁸ especially when the government “takes aim at accurate commercial information for paternalistic ends.”²⁰⁹ The FDA’s regulation seems to be well-supported by evidence that advertisements directly impact the number of new underage smokers; however, a closer look at the FDA’s empirical data reveals that their conclusion is based primarily on speculation or conjecture.

The FDA acknowledged that no one study or piece of evidence would prove that the advertising restrictions would significantly decrease tobacco use by minors.²¹⁰ Instead, the FDA broke down the effects of advertising on children and adolescents into several components.²¹¹ According to the FDA, when considered together, the evidence proved that the restrictions on advertising directly advanced the government’s interest.²¹² In reality, the FDA provided

S. Ct. 2575 (1996); *adopted as modified*, *Penn Advertising, Inc. v. Mayor & City Council*, 101 F.3d 332 (4th Cir. 1996).

204. *Id.* at 1325.

205. Harder, *supra* note 11, at 418.

206. *44 Liquormart*, 116 S. Ct. at 1509. For purposes of analyzing this prong, a reviewing court will probably consider the cumulative effect of all of the FDA’s advertising restrictions. Unlike prior cases where there was essentially one advertising restriction, e.g., a prohibition against the advertising of alcohol prices, the FDA’s rule imposes several advertising restrictions in the various media. A court could require that each individual restriction, e.g., the prohibition against brand-name tobacco sponsorships, directly advances the government’s interest. However, the more plausible solution would be to analyze the third prong considering the effect the entire regulation will have, and then analyze each individual provision separately under the fourth prong of the *Central Hudson* test. This Note utilizes this approach.

207. *See supra* Part III.C.

208. *44 Liquormart*, 116 S. Ct. at 1510.

209. *Id.*

210. FDA Regulations, *supra* note 3, at 44,476.

211. *Id.* at 44,475.

212. *Id.*

piece-mealed evidence that, when analyzed closely, proves very little.²¹³

First, the FDA stated that “perhaps the most compelling evidence” that advertising affects a young person’s decision to use tobacco is that tobacco is among the most heavily advertised products in America.²¹⁴ The FDA failed to show a nexus between the size of the industry’s advertising budget and an increase in tobacco use by children. Nevertheless, the FDA claimed that this evidence demonstrates that advertising creates a “friendly familiarity” that makes smoking seem “respectable to young people.”²¹⁵ This conclusion is too general. Other factors play an integral part in whether a child perceives smoking as respectable and, ultimately, whether a child decides to smoke. A child whose parents and peers express negative views about smoking is less likely to view smoking as “respectable,” despite the prevalence of tobacco advertisements.

Second, the FDA cited studies which showed “that children who smoke are more likely to correctly identify cigarette advertisements and slogans in which the product names or parts of the slogans have been removed than are children who do not smoke.”²¹⁶ While the FDA acknowledged that these studies did not establish that exposure to, recall of, approval of, and response to advertising caused children to smoke, the FDA included these studies because they showed that advertisements created “an important role in developing an appealing and memorable image for brands.”²¹⁷ However, “an appealing and memorable image for brands” does not necessarily equate to an increase in the number of underage smokers. The subjects of the study were children who already smoked. While this study may indicate that existing smokers may switch brands of tobacco because of advertising exposure, it proves nothing with respect to the effects of advertising on children who do not smoke.

Third, studies showed that cigarette advertising caused children to overestimate the prevalence of smoking in society.²¹⁸ While the studies did not show a causal relationship between the overestimation of smoking and the number of children who start using tobacco because of the overestimation, the FDA stated that the studies were included to show the “acceptability” of smoking.²¹⁹ Once again, this item of evidence does nothing to establish that the advertising restrictions would advance the government’s interest.

Fourth, evidence was presented to show the effectiveness of ad campaigns with respect to children.²²⁰ One study showed that ninety-one percent of six year-olds and thirty percent of three year-olds recognized “Joe Camel,” the cartoon

213. The following analysis discusses the majority of the FDA’s reasons why the regulations satisfy the third prong of *Central Hudson* and is a fairly complete portrayal of their assertions. However, some of the less persuasive rationales were omitted.

214. *Id.* at 44,475.

215. *Id.*

216. *Id.*

217. *Id.* at 44,476.

218. *Id.*

219. *Id.*

220. *Id.* at 44,477 n.110.

character marketing Camel cigarettes.²²¹ As with the other categories of evidence, this information was included not to show any correlation between advertising and smoking, but rather to show the “pervasiveness of tobacco advertising.”²²²

Fifth, the FDA presented evidence of an internal memo from the tobacco industry specifically addressing the issue of targeting young people.²²³ While this information is certainly damaging to the tobacco industry, and the “logical inference” is that advertising “play[s] an important role in young people’s smoking behavior,”²²⁴ this evidence does not show that the advertising restrictions would directly advance the government’s interest “to a material degree.”

Sixth, the FDA offered studies to show that advertising affects the brand choices of underage tobacco users.²²⁵ This item of evidence also seems irrelevant to the establishment of the FDA’s proposition because any affect on brand preference would only redistribute the market share between the tobacco companies. The FDA did not show any correlation between brand choice and an increase in the number of children who smoke. When considered together, all the FDA has established is that tobacco advertising is pervasive in society and that children are aware of it. Proving that children are alert to advertisements and are able to recognize slogans and cartoon characters does not establish that advertising restrictions will decrease tobacco consumption by minors.

Nevertheless, the FDA may still be able to satisfy its burden in showing that the regulations directly advance its asserted interest. A 1994 report issued by the Surgeon General concluded that “[a] substantial and growing body of scientific literature has reported on young people’s awareness of, and attitudes about, cigarette advertising . . . [and when] . . . considered together, these studies offer a compelling argument for the mediated relationship of cigarette advertising and adolescent smoking.”²²⁶ However, two major problems exist for relying on this report to satisfy the third prong of *Central Hudson*. The first is that the Surgeon General found only a “compelling argument” for the nexus between advertising and consumption.²²⁷ In fact, in 1989, the Surgeon General stated that there was no study available which would provide a definitive answer to whether there is

221. *Id.* (citing P.M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145, 3145-48 (1991)).

222. *Id.*

223. *Id.* at 44,480. The memo reads, in relevant part:

Evidence now available . . . indicate[s] that the 14 to 18 year old group is an increasing segment of the smoking population. RJR must soon establish a successful new brand in this market if our position in the industry is to be maintained over the long-term.”

Id. at 44,481.

224. *Id.* at 44,482.

225. *Id.*

226. U.S. Dep’t of Health and Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, 188 (1994).

227. *Id.*

a link between advertising and youth consumption, nor would it be likely that one would be “forthcoming in the foreseeable future.”²²⁸ Secondly, assuming *arguendo*, that the Surgeon General is correct that advertising does play a role in youth tobacco use, because the extent is unknown, it is impossible to prove that an advertising ban will reduce underage tobacco use to a “material degree.”

Perhaps the most compelling evidence which the FDA presented was empirical data from studies conducted in other countries where tobacco advertising had been banned. Studies showed that after an advertising restriction was put in place, the percentage of teenagers who smoked decreased significantly.²²⁹ The FDA also noted that the Court has recognized the relationship between advertising and demand for a product in recent decisions.²³⁰ However, in *44 Liquormart*, the Court refused to hold that Rhode Island’s interest was advanced when the evidence showed the advertising restriction would produce only a “marginal impact” on consumption.²³¹ The Court held that the result of the regulation must be “significant.”²³² The FDA will be required to show that a ban on tobacco advertising will produce a significant reduction in tobacco use by minors in the United States as occurred in other countries. It is questionable whether such a showing will be made in the United States and whether the third prong will be satisfied.

D. The Ban on Brand-Name Tobacco Sponsorships is Not Narrowly Drawn

The FDA’s ban on brand-name tobacco sponsorships cannot survive constitutional review because it fails the fourth prong of the *Central Hudson* test. The Court’s most recent commercial speech decision, *44 Liquormart*,²³³ presents a substantial obstacle which the regulations cannot overcome. Despite the FDA’s attempt to minimize that decision, *44 Liquormart* has reshaped the future of commercial speech jurisprudence, and cannot be ignored.

228. Ludwikowski, *supra* note 178, at 113 n.115 (citing U.S. Dep’t of Health and Human Servs., *Reducing the Health Consequences of Smoking: 25 Years of Progress; A Report of the Surgeon General*, 516-17 (1989)).

229. In Norway, the percentage of fifteen-year-old boys and girls who smoked in 1975, before a restriction on tobacco advertising and promotion was put in place, was approximately 23% and 28%, respectively. FDA Regulations, *supra* note 3, at 44,490-91. In a 1986-87 follow-up survey, that percentage had decreased to 16% and 17% respectively. *Id.* Norway banned all advertising of tobacco products in 1975. *Id.* Between 1975 and 1990, the percentage of daily smokers aged 13 to 15 declined from 15% to 9% for boys and from 17% to less than 10% for girls. *Id.*

230. *Coors Brewing Co.*, 514 U.S. at 487 (“It is assuredly a matter of ‘common sense’ that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait.”); *44 Liquormart*, 116 S. Ct. at 1506 (Justice Stevens quoted with apparent approval of *Central Hudson*’s reliance on the “immediate connection” between “promotional advertising” and demand).

231. *44 Liquormart*, 116 S. Ct. at 1510.

232. *Id.* at 1509-10.

233. *See supra* Part III.C.

The FDA attempts to circumvent *44 Liquormart* by (1) relying on precedent which has been either disavowed or subsequently modified; (2) distinguishing *44 Liquormart*; and (3) asserting that the regulations are still consistent with commercial speech jurisprudence.

First, the FDA stated that the Court does not use the “least restrictive means” test; rather all that is necessary is a “reasonable fit” between the regulation and the government’s substantial interest to satisfy the fourth prong of *Central Hudson*.²³⁴ However, the FDA failed to consider that in *44 Liquormart* the Stevens bloc seemed to implicitly adopt the “least restrictive means” test;²³⁵ the O’Connor bloc found that less burdensome alternatives may indicate that the fit is not reasonable;²³⁶ and that Justice Thomas wrote that the *Central Hudson* test should be abandoned completely.²³⁷ Clearly, the FDA’s position that it had not “mischaracterized its burden”²³⁸ is wrong.

Second, the FDA asserted that the amount of constitutional protection afforded commercial speech is “commensurate with its subordinate position in the scale of First Amendment values,” despite language to the contrary in *44 Liquormart*.²³⁹ In *44 Liquormart*, three Justices stated that “when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”²⁴⁰ The FDA said that this statement had no application to the tobacco regulations because the “FDA is not entirely prohibiting the dissemination of commercial messages about cigarettes and smokeless tobacco . . . [and because] . . . the restrictions are related to the bargaining process.”²⁴¹

The FDA is incorrect on both accounts. The ban on brand-name sponsorship is effectively a complete ban. In *44 Liquormart*, Justice Stevens wrote that “Rhode Island’s price advertising ban [on alcoholic beverages] constitute[d] a blanket prohibition against truthful, nonmisleading speech about a lawful product.”²⁴² Rhode Island’s advertising ban only prohibited the advertising of prices of alcoholic beverages, but allowed alcoholic beverages to be advertised in general.²⁴³ Yet, the Court held that the advertising restriction was a “blanket prohibition.”²⁴⁴ The FDA’s ban on brand-name sponsorship is much more

234. FDA Regulations, *supra* note 3, at 44,496. (citing *State Univ. v. Fox*, 492 U.S. 469, 480 (1989)).

235. *See supra* note 152 and accompanying text.

236. *See supra* note 170 and accompanying text.

237. *See supra* note 167 and accompanying text.

238. FDA Regulations, *supra* note 3, at 44,496.

239. *Id.* at 44,470. (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995)).

240. *44 Liquormart*, 116 S. Ct. at 1507.

241. FDA Regulations, *supra* note 3, at 44,470.

242. *44 Liquormart*, 116 S. Ct. at 1508.

243. *Id.* at 1501.

244. *Id.* at 1508.

intrusive. By allowing sponsorship only in the corporate name, a tobacco manufacturer cannot provide information to consumers about a particular product. Thus, the industry is completely banned from disseminating a commercial message about its product to consumers in the sponsorship context. The FDA's assertion that tobacco manufacturers can still provide information about a product is incorrect. If the product is laundry detergent, and the same rule is in effect, i.e. sponsorship only in the corporate name, Procter & Gamble, a company that manufactures many different brands of laundry detergent, could not effectively advertise the brand Tide if it was allowed only to sponsor an event under its corporate name. Therefore, the FDA's contention that its regulations are not a complete ban on advertising is without merit.

Furthermore, the FDA seems to mischaracterize what the Court in *44 Liquormart* meant when it referred to the "preservation of a fair bargaining process."²⁴⁵ The Court sought to protect consumers from misleading, deceptive, or aggressive sales practices which would prevent them from making a meaningful choice.²⁴⁶ The prohibition of truthful, nonmisleading advertising usually has the opposite effect by "hinder[ing] consumer choice."²⁴⁷ Therefore, the stricter standard of review adopted in *44 Liquormart* cannot be dismissed as inapplicable.

Third, the FDA claims that no alternative to its regulation will directly advance the government's interest; therefore, the regulation is narrowly drawn.²⁴⁸ The FDA contends that no governmental program has successfully reduced teenage smoking in the past; that non-speech alternatives are being implemented in conjunction with the speech restrictions; and for the government's interest in protecting children and adolescents to be furthered, restrictions on advertising must be imposed concurrently with non-speech restrictions.²⁴⁹ Nevertheless, the ban on brand-name sponsorships is "more extensive than necessary." As the principle opinion in *44 Liquormart* suggests, the existence of alternative non-speech regulations will make the regulation fail the fourth prong.

Alternative forms of non-speech regulation are in abundance. Better enforcement of existing laws prohibiting the sale of tobacco to minors would directly advance the FDA's interest by reducing underage tobacco use. In 1992, Congress passed the Alcohol, Drug, Abuse, and Mental Health Administration (ADAMHA) Reorganization Act of 1992.²⁵⁰ The Act prohibits the Department of Health and Human Services (DHHS) from providing block grants for the treatment and prevention of substance abuse to a state unless the state prohibits the sale and distribution of tobacco products to persons under eighteen.²⁵¹ The

245. *Id.* at 1507.

246. *Id.*

247. *Id.* at 1508.

248. FDA Regulations, *supra* note 3, at 44,499.

249. *Id.*

250. ADAMHA Reorganization Act of 1992, Pub.L. No. 102-321, 106 Stat. 323 (1992). 42 U.S.C. § 201 (1994).

251. 42 U.S.C. § 300x-26(a)(1) (1994).

DHHS said that “[e]liminating virtually all sales [of tobacco products] to minors does not even present particularly difficult enforcement problems.”²⁵²

An educational campaign warning children and adolescents about the associated risks of tobacco use would be another “less burdensome alternative.”²⁵³ An increased tax imposed upon tobacco would also likely reduce tobacco use. In *44 Liquormart*, Justice Stevens approved of increased taxation and educational campaigns as alternatives to restricting speech in striking down the alcohol price advertising ban.²⁵⁴

Providing warnings about the dangers associated with tobacco use at sponsored events would be less restrictive. For example, anywhere the name of a tobacco product appears at a race track (i.e. cars, flags or race programs) an appropriate warning label, similar to what is currently on tobacco products, could be displayed. Considering the available alternatives and the Court’s stricter application of the fourth prong,²⁵⁵ it seems that the regulations fail to pass constitutional muster on these factors alone.

Even more fatal to the sponsorship ban is that it does not differentiate between events attended primarily by adults and those attended by a substantial number of children. The ban is a blanket ban on all events. If a substantial number of children are not present or are not watching a sponsored event, like an automobile race, then the government’s interest is not substantially advanced and the regulations are not narrowly drawn.

NASCAR is an adult-oriented sport. According to NASCAR statistics, only three percent of the spectators at NASCAR races are under the age of eighteen.²⁵⁶ With an average attendance of 171,830, the regulations will “further” the FDA’s substantial interest by protecting only 5,155 children and adolescents from tobacco advertising at each race. The FDA dismissed the fact that the number of children who attend races was not substantial. The FDA said that they “did not receive any data to support or refute these numbers,” and that, in any event, “recent reports in the press indicate that the number of young people attending these events *may* be growing.”²⁵⁷ Instead, the FDA emphasized the glamour and excitement that is associated with sponsors of racing events or teams, even

252. 58 Fed. Reg. 45156, 45165 (1993).

253. As part of the rules, the FDA is not requiring an educational campaign. However, the FDA does plan to implement a educational campaign using the notification system under section 518(a) of the Federal Food, Drug, and Cosmetic Act (FDCA). If the FDA finds that a device “presents an unreasonable risk of substantial harm, then, after consultation with tobacco manufacturers, they can issue a notification that requires tobacco manufacturers to notify young people about the substantial health risks associated with tobacco. FDA Regulations, *supra* note 3, at 44,538.

254. *44 Liquormart*, 116 S. Ct. at 1510.

255. See *supra* Part III.C.

256. NASCAR PUBLIC RELATIONS MATERIALS, *supra* note 29.

257. FDA Regulations, *supra* note 3, at 44528 (emphasis added). Apparently the FDA did not make an attempt to verify the data; rather, they deferred to what was reported in the press.

though that has no relevance to the regulations being narrowly drawn.²⁵⁸

The FDA also observed that, besides the spectators at a race, there are the millions of viewers watching on television.²⁵⁹ While this is a valid consideration, the number of children who watch racing on television is not substantial. Children and adolescents only comprise seven percent of the total television audience. Combining spectators and television viewers, children and adolescents comprise only 6.7 percent of the total audience.²⁶⁰

For the FDA to claim that this number justifies a sponsorship ban is contrary to its own methodology in its restrictions on the use of color and imagery in print publications. To draw its print advertising restrictions as narrowly as possible, the FDA decided not to limit advertisements to a text-only format where the publication was primarily an “adult publication.”²⁶¹ The FDA defines adult publications as those publications “(1) [w]hose readers age 18 or older constitute 85 percent or more of the publication’s total readership, or (2) that are read by fewer than 2 million people under the age of 18, whichever method ensures the fewest young readers.”²⁶² The FDA stated that their “concern is with advertising that affects minors and with tailoring the restrictions in this final rule to burden as little speech as possible” and “that an exception from the text-only requirement for publications that are read primarily by adults is still reasonable and feasible.”²⁶³

With respect to imposing a similar type of threshold test to sponsored events, the FDA rejected the idea and stated that it was “not aware of any way to limit the restriction to events that are attended by young people.”²⁶⁴ Perhaps the FDA realized that under this type of analysis, motorsport events, as well as most other sponsored events, would fall outside the regulation. In fact, the number of adult spectators at a NASCAR Winston Cup race barely exceed the print regulations two million person benchmark.²⁶⁵ Children and adolescents do not even come

258. *Id.* at 44,529.

259. *Id.* at 44,528.

260. Combining 5155 children who are live spectators and 180,791 children who are watching on television (calculated by dividing 64 million children (the total of children television viewers per year) by 354 (the number of televised events)), the average number of children and adolescents in affected at any one race is 185,946. The average total audience for any given race is 2,756,575 persons (2,584,745 television viewers and 171,830 spectators).

261. FDA Regulations, *supra* note 3, at 44,513.

262. *Id.*

263. *Id.* at 44,514.

264. *Id.* at 44,534.

265. The number of adults at a single NASCAR Winston Cup race is 166,675 (97% of 171,830 total spectators). The number of adult television viewers is 2,403,954 per race (93% of 915 million total television viewers, divided by 354 televised racing events). The total adult audience for a single race equals 2,570,629. The black and white, text-only format for print advertisements only takes effect when the number of readers under age 18 for the publication reaches two million. Therefore, the total number of adults who view in person and on television a single NASCAR race only exceeds the FDA’s threshold by 570,629 persons. The number of children at a NASCAR race

close to reaching these numbers. Furthermore, under the two million readership benchmark, one weekly publication with an average youth readership of 1.5 million per week will yield a higher number of children being exposed to colorful and image-filled advertisements in one year than in one year of motorsport broadcasts. This is just one of many publications; the cumulative effect is far greater.

Using the FDA's own statistics and methodology, there is no question that NASCAR, and the entire world of motorsports, is primarily an adult industry. The FDA's regulations have effectively reduced what adults may see at a racetrack to "only what is fit for children."²⁶⁶ Since the brand-name sponsorship ban serves to effectively prohibit the dissemination of truthful, nonmisleading advertisements to adults, the regulations must fail because they are not narrowly drawn.

V. PROPOSAL

While Parts III and IV of this Note observed that the Court in *44 Liquormart* seemed to imply that the existence of any non-speech alternative would cause the regulation to fail, the impact of that case is yet to be felt. The Court did not overrule *Central Hudson*; therefore, commercial speech cases are still decided by using a balancing test. Furthermore, the interpretation of *44 Liquormart* in the various circuits is still unknown. The Fourth Circuit, on remand from the Supreme Court to reconsider a case in light of *44 Liquormart*, upheld a city ordinance which prohibited the advertisement of tobacco on billboards and signs in a "publicly visible location" in designated locations.²⁶⁷ If the fourth prong of the *Central Hudson* test is interpreted as strictly as *44 Liquormart* suggests, that the existence of non-speech alternatives make any speech regulation fail, then it is likely that the following proposal would fail as well. However, if the fourth prong does not require a true "least restrictive means," then the proposal will pass constitutional muster because it is narrowly drawn.

To ensure that it will pass constitutional muster, the ban on brand-name sponsorship of sporting events, teams, and entries should be redrafted similarly to the print regulations.²⁶⁸ Brand-name sponsorship should be permitted when a substantial majority of the audience is adult. The FDA's fifteen percent/two million person benchmark for print advertisements is a reasonable method for

falls approximately 1.8 million persons under the threshold. *NASCAR Demographics*, *supra* note 29.

266. *Bolger*, 463 U.S. at 73 (striking down a ban which prohibited unsolicited advertisements for contraceptives).

267. *Penn Advertising, Inc. v. Mayor & City Council*, 101 F.3d 332 (4th Cir. 1996). In its analysis of the fourth prong, the court only looked at whether there were less restrictive means of screening outdoor advertising from minors, rather than if there were any less restrictive means which would directly advance the city's interest in protecting minors. The court found that there were no less restrictive means, and thus, the advertising satisfied the fourth prong. *Id.*

268. *See supra* Part IV.D.

determining whether brand-name sponsorships should be allowed. This number ensures that the advertising ban would affect a substantial number of children, and, thus, would further the government's interest in protecting children.

The new rule should read as follows:

No manufacturer, distributor, or retailer may sponsor or cause to be sponsored any athletic, musical, artistic, or other social or cultural event, *series of events*, or any entry or team in any event *or series of events*, in the brand name, logo, symbol, motto, selling message, recognizable color, pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco, *unless such athletic, musical, artistic, or other social or cultural event, or series of events, or any team or entry participating in such an event is an adult event or series of events.*

Nothing, however, shall prevent a manufacturer, distributor, or retailer from sponsoring any athletic, musical, artistic, or other social or cultural event, *series of events*, entry or team in its corporate name.²⁶⁹

An "adult event" should be defined as "any event in which the number of persons under the age of eighteen in attendance and viewing on television is (1) less than fifteen percent of the total persons in attendance and viewing on television, or (2) less than two million." A "series of events" should be defined as "the sum of individual events which comprise a series or season." Some examples would include, but are not limited to, NASCAR auto racing, Major League Baseball, the National Basketball League, the National Football League, and the PGA tour. In determining whether a series of events is an "adult series of events," the total number of persons under the age of eighteen in attendance or viewing on television for the entire series or season should be used to arrive at a per event average. The per event average must satisfy the criteria for an "adult event" in order to be considered an "adult series of events."

The fifteen percent/two million person benchmark is borrowed from the FDA's method of determining what constitutes an adult publication. In arriving at fifteen percent, the FDA considered the percentage of children between the ages of five and seventeen, the ages of young readers, in the United States and found them to be roughly fifteen percent of the total population.²⁷⁰ Thus, any magazine with a readership above this percentage would be more directed at children. This approach makes sense because any percentage higher than the total percentage of the child population would mean that a disproportionate number of children and adolescents were being exposed to tobacco advertising. Because the total percentage of persons under eighteen in the United States is 25.7 percent,²⁷¹ the argument could be made that the percentage threshold should

269. This is substantially the same language as the FDA's rule as codified at 21 CFR § 897.34(c) (1996). The additions included in this proposal have been italicized.

270. FDA Regulations, *supra* note 3, at 44,516.

271. U.S. Bureau of the Census, 1990 Census.

be twenty-five percent. However, that figure would allow brand-name advertising to reach a substantial number of children. Thus, fifteen percent is still a reasonable number for sponsored events.

The two million person benchmark set forth in the print regulations is also justified for sponsored events. Some deference should be afforded the FDA's conclusion that, at some point, the total number of children affected by tobacco advertisements becomes substantial.²⁷² Two million seems reasonable, and there is no reason to depart from that number for sponsored events.

The "adult series of events" definition is included as a matter of consistency and fairness. In NASCAR Winston Cup Racing, there are thirty-two events each year. The sponsorship of a racing team is usually a commitment that lasts the entire racing season. The determination of whether a tobacco company can sponsor a team in a brand-name should be made only once. It would be confusing to all involved to say that with respect to races A, B, and C, it is the NASCAR Winston Cup Racing Series, but at races X, Y, and Z, it is the NASCAR R.J. Reynolds Racing Series. Since all thirty-two events make up an entire NASCAR season, it is fair to both the FDA and the tobacco companies to make one computation and determine whether the series is eligible for brand-name sponsorships.

The figures used to determine brand-name sponsorship eligibility should be based on the last series or season, if available. If not, then the figures should be based on reliable estimations. Simmons Market Research Bureau, Inc., which the FDA cites with approval in the print advertising regulations and who currently provides marketing research for NASCAR, and Nielsen, which provides television ratings, are reliable sources who are readily available to determine if the event or series can be sponsored in a brand-name. The burden of verifying that the statistics are correct should be upon the tobacco industry. Furthermore, if brand-name sponsorship does not meet the criteria, the tobacco companies still have available the option to sponsor an event in its corporate name. Thus, this proposal does not close all avenues of advertisement if the fifteen percent/two million benchmark cannot be satisfied.

This proposal is a solution to the FDA's overly broad, existing rule. It promotes the FDA's substantial interest in protecting children and adolescents from tobacco advertising, yet it is consistent with commercial speech jurisprudence in that it is narrowly drawn. This proposal differentiates between events that are primarily adult and those that are not. This proposal should be upheld in court because it does not impose a blanket ban on advertisements, but rather sets forth criteria which must be satisfied for the sponsorship ban to take effect. Finally, the proposal is flexible. While the number of children that attend NASCAR races "may be growing," the fact remains that NASCAR is primarily an adult sport. As long as this is true, the sponsorship ban should not apply. When, and if, the number of children reach the benchmark numbers, the ban would take effect and the FDA's interest would be served.

272. FDA Regulations, *supra* note 3, at 44,514.

CONCLUSION

The consequences associated with tobacco use cannot be ignored. Hundreds of thousands of lives are lost each year because of tobacco use. Although tobacco is a legal product, the tobacco industry must take a responsible position in its efforts not to intentionally market its product to children and adolescents. Nevertheless, the concepts of individual liberty and freedom are principles upon which this nation was built. The First Amendment cannot be trampled upon solely because of what the government perceives as best for society. With respect to these competing interests, the need for an effective, but constitutional, solution is great. Adopting a fifteen percent/two million benchmark strikes a reasonable balance between furthering the FDA's interest in protecting future generations from the harms of tobacco use and preserving the integrity of the First Amendment.